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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

v.

PULLMAN-STANDARD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED*

1. Does the plaintiff or the defendant bear the burden of proof as to whether a seniority system is "bona fide" under section 703(h) of Title VII and Teamsters v. United States, 431 U.S. 324 (1977)?

2. Where an employer or union engages in intentionally discriminatory seniority practices whose purpose and effect is to nullify or violate the nominal seniority rights of blacks, is their seniority system nonetheless "bona fide" so long as those discriminatory

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* Most of the discriminatory seniority practices at issue in this case were originally adopted before 1965, the effective date of Title VII. One of the issues raised in Lorance v. A.T.& T. Technologies, No. 87-1428, is whether intentionally discriminatory seniority practices are immune from attack if those practices were adopted prior to the effective date of Title VII. (See pp. 32-34, infra.

seniority practices are not explicitly set forth in the nominal written seniority rules?

3. Where a written seniority system was framed for the express purpose of discriminating on the basis of race, may an employer nonetheless invoke the "bona fide seniority system" exception of section 703(h) on the ground that it was the union which sought and framed the racially motivated provisions, and that the company agreed to that racially motivated system simply to accommodate the wishes of the union?

4. Did the lower courts err in failing to determine whether discriminatory intra-departmental seniority practices continued after 1965?

PARTIES

The petitioners are Louis Swint, Willie James Johnson, William B. Larkin, Spurgeon Seals, Jesse B. Terry, Edward Lofton, and the class of all black workers employed at the Bessemer plant of Pullman-Standard between 1965 and 1974.

The respondents are Pullman-Standard, a division of the Pullman, Inc., the United Steelworkers of America, AFL-CIO, Local 1466 of the United Steelworkers of America, the International Association of Machinists, and Local 372 of the International Association of Machinists.

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No. 88-

IN THE

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October Term, 1988

LOUIS SWINT, etc., et al.,

Petitioners,

v.

PULLMAN-STANDARD, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Louis Swint, etc., et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit entered in this proceeding on September 21, 1988.

OPINIONS BELOW

The decision of the Eleventh Circuit is reported at 854 F.2d 1549 (11th Cir. 1988), sub. nom. Larkin v. Pullman-Standard, and is set out at pp. 58a-211a of the Appendix; the portions of that opinion of particular relevance to this petition are set out at parts IA and V of the opinion pp. 64a-68a and 166a-184a. The Court of Appeals decision denying rehearing, which is not yet reported, is set out at pp. 212a-215a of the Appendix. The Eleventh Circuit opinion reviewed three earlier district court orders, dated Sept. 8, 1986, Nov. 25, 1986 and Nov. 25, 1986; these orders, none of which are officially reported, are set forth at pp. 5a-40a, 41a-53a and 54a-57a, respectively, of the Appendix. Part III of the September, 1986, opinion (App. 23a-31a),

deals with the issues raised by this instant petition.

This case, which has been pending for 18 years, was the subject of two previous appeals, one of which was heard in this Court. The previous reported opinions, in chronological order, are as follows:

Swint v. Pullman-Standard, 11 FEP Cas. 943 (N.D.Ala. 1974)

Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976)

Swint v. Pullman-Standard, 15 FEP Cas. 144 (N.D.Ala. 1977)

Swint v. Pullman-Standard, 15 FEP Cas. 1638 (N.D.Ala. 1977)

Swint v. Pullman-Standard, 17 FEP Cas. 730 (N.D.Ala. 1978)

Swint v. Pullman-Standard, 624 F. 2d 525 (5th Cir. 1980)

Pullman-Standard v. Swint, 456 U.S. 273 (1982)

Swint v. Pullman-Standard, 692 F.2d 1031 (5th Cir. 1983) (App. 1a-4a)

JURISDICTION

The original decision of the Eleventh Circuit was entered on September 21, 1988. A timely petition for rehearing was denied on January 3, 1989. (App. 212a-215a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful practice for an employer --
>
> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race....

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different ... terms, conditions, or privileges of employment pursuant to a bona

> fide seniority ... system ... provided that such differences are not the result of an intention to discriminate....

STATEMENT OF THE CASE

The procedural history of this litigation is summarized in part II of the Fifth Circuit's 1986 opinion (70a-98a). This Title VII action was originally filed in 1971 by several black employees at the Bessemer, Alabama, plant of Pullman-Standard. The plaintiffs alleged that the company and the United Steelworkers (USW) had engaged in a variety of racially discriminatory practices, and that the effects of those discriminatory practices were perpetuated by the seniority system in effect at the plant.

The nominal terms of the seniority system were embodied in two collective bargaining agreements, one between Pullman-Standard and the Steelworkers, and a second between Pullman-Standard and the

International Association of Machinists (IAM). The two unions represented different, albeit closely related departments in the same plant. There were, for example, two separate Maintenance Departments, one represented by the USW and the other represented by the IAM. The seniority rules in the Pullman-Standard-IAM agreement directly affected the promotion and transfer rights of Pullman-Standard employees in USW represented departments, since that agreement required any worker in a USW unit to forfeit all seniority if he or she moved into an IAM represented department.

The case was originally tried in 1974. The district court held that the seniority system at the Bessemer plant did not have any discriminatory effect. The court acknowledged that most blacks had been assigned to particular departments on

the basis of race, and that the seniority system -- which forfeited all seniority rights of any person transferring to a new department -- locked blacks into those departments. The district court reasoned, however, that the departments to which blacks had been assigned on the basis of race were in fact as desirable as the departments to which most whites had been assigned. Swint v. Pullman-Standard, 11 FEP Cas. 943 (N.D.Ala. 1974). In 1976 the Court of Appeals, noting that virtually none of the higher paying jobs at the plant were in the units to which blacks were restricted by the seniority system, reversed and remanded for further proceedings. Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976).

While the case was pending on remand, this Court decided Teamsters v. United States, 431 U.S. 324 (1977), which held

that Title VII permitted the use of a seniority system which perpetuated the effects of prior discrimination, so long as the system was bona fide. In light of Teamsters, the district court in 1977 held an additional hearing on the bona fides of the seniority system at the Bessemer plant. Swint v. Pullman-Standard, 15 FEP Cas. 1638. The district court concluded that the system was indeed bona fide. Swint v. Pullman-Standard, 17 FEP Cas. 730 (N.D.Ala. 1978).

The Court of Appeals in 1980 again reversed, holding that the district court's finding of bona fides rested on subsidiary findings which were either tainted by errors of law, or were clearly erroneous. The appellate court concluded that the evidence demonstrated that the seniority system was not bona fide. Swint v. Pullman-Standard, 624 F.2d 525 (5th

Cir. 1980). This Court granted certiorari to consider whether the Court of Appeals had erred in deciding itself whether the system was bona fide, rather than remanding the case for reconsideration by the district court. The Court held that Rule 52, Federal Rules of Civil Procedure, required that the district court be afforded an opportunity to reassess the bona fides of the system in light of the subsidiary errors identified in the circuit court's 1980 opinion. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

On remand in 1986 the district court again upheld the seniority system as bona fide. (App. 23a-31a). On appeal the Eleventh Circuit affirmed. (App. 166a-184a). Petitioners had prevailed on several other claims, and the company filed a timely petition for rehearing with regard to those aspects of the case. The

petition for rehearing was denied (App. 212a-215a).[1]

STATEMENT OF FACTS

The dispute in the instant case regarding the bona fides of the seniority system turns on four seniority related practices, described below. In most instances the lower courts agreed that the seniority related practices were racially motivated, but held that the seniority system was nonetheless bona fide.

(1) Seniority Rules Governing Intra-Department Promotions

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[1] The instant petition, like the relevant portions of the Eleventh Circuit decision, is concerned with whether the seniority system at issue is bona fide within the meaning of section 703(h). In the context of this litigation, however, resolution of the section 703(h) issues has somewhat broader ramifications for the parties. The Eleventh Circuit properly recognized that a subsidiary finding of post-Act discrimination, even if based on evidence originally adduced primarily to show non-bona fides, might also entitle petitioners as well to a remedy for that post-Act discrimination as such. (App. 153a-157a).

(a) Prior to 1965

In 1954 the ostensible seniority system required that promotions within a given department be awarded to the most senior department employee in a lower level position.[2] It is undisputed, however, that prior to 1965 the actual seniority practice was entirely different. The district court[3] and the Eleventh Circuit[4] agreed that at least until 1965

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[2] App. 66a; 456 U.S. at 278-79.

[3] 11 FEP Cas. 943, 947 and n. 12 (N.D.Ala. 1974); 15 FEP Cas. 144, 147 n. 7, 148 (N.D.Ala. (1977); 17 FEP Cas. 730, 733 (N.D.Ala. 1978).

[4] App. 64a-65a:

> "[P]rior to 1965 ... [t]here were ..., within each mixed-race department, 'white' jobs and 'black' jobs, meaning that when a particular job was vacated, it was necessarily filled with an employee of the same race. The 'white' jobs tended to be the higher paying; and the 'black' jobs the lower paying."

the seniority system was avowedly racial in nature, since only whites could promote into "white" jobs, while black in the same department were limited to lower paying "black" jobs. Thus if a vacancy arose in a "white" job, it was awarded to the most senior white worker, regardless of whether one or more blacks in the unit actually had more departmental and plant seniority.

(b) Subsequent to 1965

There is an unresolved dispute as to whether this race based seniority practice in fact ended in 1965, or continued for years thereafter. At the 1974 trial petitioners introduced extensive testimony that the old "white" jobs were still being filled by less senior whites in place of more senior

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See also 539 F.2d 77, 83 (5th Cir. 1976).

blacks.[5] Black witnesses testified that the company frequently did this by providing training only to the white employees in lower level positions, and then deeming the more senior blacks ineligible because they lacked that training.[6] Petitioners asked that this systematic disregard of the seniority rights of blacks be ended, in part, by an order requiring the company to post a notice of all vacancies.

In its 1974 opinion the district court, although refusing to order any posting of vacancy announcements, did not decide whether the pre-Act race based

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[5] See e.g., R.v. 3, pp. 56-62, 81, 103-04, 126-32, 160-61, 191, 210-12; R.v. 4, pp. 311-13, 341-42, 375-76, 471, 481, 528; R.v. 5, pp. 534, 580; R.v. 6, pp. 840, 847, 895.

[6] See, e.g., R.v. 3, pp. 103, 105, 126-28, 139-45,, 207-09, 238-42; R.v. 4, pp. 262, 342, 347-48; R.v. 5, pp. 615-16, 630; R.v. 6, p. 753, 923-24, 948, 951-52.

promotion system had continued after 1965. 11 FEP Cas. at 959. The court of appeals in 1976 directed the district court, inter alia, to reconsider its denial of the requested posting order. 539 F.2d at 102. In its 1977-78 opinions, however, the district court inexplicably failed to do so. When the case was again remanded in 1984, petitioners reiterated their contention that the seniority system for promotions had even after 1965 been administered in a discriminatory manner, and sought to introduce additional evidence to supplement the extensive testimony adduced on this subject at the 1974 trial. (App. 30a n. 25).

In its 1986 opinion, the district court acknowledged that that record contained evidence of such discrimiantory application of the seniority system, but insisted that consideration of that issue

was outide the scope of the remand. (App. 30a n. 25). On appeal the Eleventh Circuit apparently agreed that its 1983 remand order did not permit the district court to decide whether discriminatory intra-departmental seniority practices continued after 1965. (App. 181a). Thus, none of the numerous lower court opinions in this case has ever decided, on the basis of the record at the 1974 trial or otherwise, whether the discriminatory operation of the seniority promotion system ended in 1965 or at a later date. (See App. 67a n. 10).

(2) The Division of Existing Integrated Departments Into All-White and All-Black Seniority Units

Prior to 1940 there was a single, racially integrated Maintenance Department and a single, racially integrated Die and Tool Department. In 1941 each of these departments was subdivided into separate

single-race seniority units, an all-white Maintenance Department and an all-white Die and Tool Department, both represented by the International Association of Machinists, (App. 64a) and an all-black Maintenance Department and Die and Tool Department, and Die and Tool Department, both represented by the United Steelworkers. The salary levels were generally higher in the jobs placed in the IAM represented departments. Also in 1941 Pullman-Standard agreed with the IAM to a seniority rule which forbad any person in the all-black Maintenance or Die and Tool Departments to use his company or departmental seniority when bidding on jobs in the IAM represented Maintenance and Die and Tool Departments. This unusual dual system of two Maintenance Departments and two Die and Tool Departments continued in existence until

the plant closed in 1980, as did the seniority rule creating separate seniority rights and rosters for the duplicate departments.

Both courts below agreed that this dual system was established at the behest of the IAM, and that the IAM's purpose in framing this dual was to create a seniority system that would prevent blacks in Maintenance or Die and Tool jobs from promoting into the better paid all-white positions represented by the IAM. App. 25a and n. 20, 173a; 624 F^2 at 532-33.

Although the IAM was the prime mover behind this deliberately discriminatory seniority system, it was Pullman-Standard which actually enforced that system, maintaining the separate seniority rosters for the dual system, and refusing to credit time worked in the all-black units in making promotions into or within the

duplicate IAM units. The company expressly agreed to and signed with the IAM the collective bargaining agreement which provided for these seniority rules. The company has never claimed that it was unaware of the IAM's motives, nor could it plausibly do so. The IAM's constitution in 1941, and for years thereafter, expressly limited membership to whites. (App. 25 n. 20) When the NLRB certified the IAM, against its wishes, as the representative of some 24 blacks from the original Maintenance and Die and Tool Departments, the IAM "ceded" those positions to the USW, effectively transferring them from the IAM represented unit to the USW represented unit, and thus stripping them of the rights they enjoyed under the original NLRB certification to bid on the better paid jobs represented by

the IAM.[7] Until 1970 the company only hired whites into the two IAM departments.

From the effective date of Title VII, until the plant closed in 1980, this racially motivated seniority arrangement was enforced by the company against any person in a USW Maintenance or Die and Tool job who sought to move into the better paid Maintenance and Die and Tool jobs represented by the IAM. There is no question that these seniority rules, had they been administered by the IAM, would not have been "a bona fide" seniority system. The Eleventh Circuit reasoned, however, that both the dual departmental system and the seniority rules effectively prohibiting transfers from the black to the parallel white units were bona fide seniority systems because they were administered instead by Pullman-Standard,

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[7] 624 F.2d at 531.

which had not divided the original integrated departments on its own initiative, but merely did so to accommodate the wishes of the racially motivated IAM. (App. 173a-175a).

(3) The Creation of New Single Race Departments

Prior to 1950 virtually all the departments represented by the USW were racially mixed although, of course, blacks could not be promoted into "white" jobs in their departments. In 1954 the defendants created out of the mixed departments 8 new single race departments, 5 all-white and 3 all-black. (See App. 64a). The creation of these new single race units had a severe effect on the nominal seniority rights of blacks. Those black workers moved into all-black departments lost the right to be promoted without seniority forfeiture into jobs in their former departments. Black workers in departments

from which "white" jobs were removed could no longer use their nominal seniority right to promote into those jobs. These new departments and attendant transfer barriers became of decisive importance when, at an undetermined point after the adoption of Title VII, black employees were finally permitted to promote into white jobs in their own departments.

During the 1978 hearing regarding the bona fides of the seniority system, petitioners urged that the redrawing of these departmental lines to create 8 single-race departments was racially motivated. The district court in 1978 made no finding as to whether this 1954 gerrymandering of departmental lines was racially motivated; the trial court merely commented that the new departmental lines

were "rational." 17 FEP Cas. at 734-37.[8] On appeal the circuit court held that this finding of rationality was clear error, and went on to hold that "[t]he establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races." 624 F.2d at 531; see also id. at 532. When the case was in this Court, the defendants urged the Court to overturn the circuit court's holding on this issue, and to find that the creation of the 8 single-race departments was the result of legitimate

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[8] See, e.g., 17 FEP Cas. at 735 ("while the company's apparently unilateral creation of a separate Inspector's department ... can be seen as having a racial impact (all the inspectors were white), this change was certainly rational.")

considerations.[9] This Court declined to do so.

On remand in 1984-86 we again urged that the creation of the 8 single race departments was racially motivated. The district court's 1986 opinion contained no discussion whatever of this issue. On appeal the Eleventh Circuit read this Court's opinion to criticize appellate reconsideration of the district court's 1978 finding that the new departmental lines of rational. (App. 177a N. 44). The latest circuit court decision appears to reinstate the 1978 district court holding that those lines are rational. The district court, however, never decided whether those lines, even if rational,

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[9] Brief for Petitioners, Nos. 80-1190 and 80-1193, pp. 18, 40, 10a-16a.

were in fact racially motivated; that question remains, at best, unresolved.[10]

(4) The Racially Motivated 1965 Training Requirement

Under the seniority system, as it existed before and after 1965, a vacancy in a higher paying job was to be filled, in theory, by the most senior department employee in a lower level position. Prior to 1965 the normal practice was to give the senior worker whatever on-the-job training was needed to perform the work involved. In some instances the senior employee would be given such informal training prior to the actual reassignment; in other instances he would be trained after being promoted. 11 FEP Cas. at 947 n. 16. The most important application of this on-the-job training practice was with

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[10] Petitioners maintain that the 1980 finding of racial motivation, not having been overturned by this Court, remains the law of the case.

regard to welders, since two-thirds of the best paid positions at the Bessemer plant were welder jobs. Prior to 1965, of course, welder was a "white" job, and welder vacancies were awarded to the most senior white in the lower levels of the welding department, even though there were blacks in the department with far greater seniority.

In 1965, following the enactment of Title VII and a related arbitration proceeding, blacks in the welding department had a clear right to be considered for the white welder jobs. Virtually all the more senior department workers below the welder level were black, and blacks would have won the vast majority of welder jobs had promotions been made -- as the ostensible seniority system had always required -- on the basis of seniority. At this juncture, Pullman-

Standard radically changed the system for selecting new welders; it declared that no worker could utilize his seniority to promote into a welder job unless he first acquired welding experience, or completed a welding training program, outside the Bessemer plant. The company eliminated the long-standing on-the-job training program, and announced that it would refuse even to test the welding skills of workers who had claimed to have learned those skills at the Bessemer plant itself.

This change in rules effectively nullified the seniority rights of the blacks in the Welding Department. In the following 6 years, only 26 of the 198 black welder helpers, all with substantial seniority, were promoted to welder positions. During the same period 417 newly hired whites, all with less seniority than the black welder helpers,

became welders.[11] The company admitted that it had abolished on-the-job training, and substituted an outside training requirement, because its white welders refused to obey orders to train black workers.[12] Both the district court[13] and

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11 PX 12, 18; Exhibit Appendix, No. 74-3726 (N.D.Ala), pp. 65X, 275X.

12 The key Pullman-Standard supervisor explained:

"Q. [W]hy didn't Pullman just go out and tell the White employees to start training the Black employees.... [W]hy didn't Pullman go tell the White employees that were on the higher jobs to start training the Black employees that had the seniority?

A. "Well, mister, ... there is no man can force me to train somebody I don't want to train. Those fellows in their estimation, they had a valid reason for not training me with 40 years service and they didn't have but 15 because it was taking bread and money out of his mouth and pocket. In other words, people were caught in that they were victims of a situation they had no control over."

(R.v. 14, transcript of hearing of May 1, 1984, pp. 127-28). Counsel for the

the Eleventh Circuit[14] agreed that this change in the seniority rights of blacks in the welding department was the result of intentional racial discrimination.

REASONS FOR GRANTING THE WRIT

Twelve years ago, in Teamsters v. United States, 431 U.S. 324 (1977), this Court held that under section 703(h) of Title VII an employer may engage in practices which perpetuate the effects of past discrimination so long as those

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company offered the same explanation. (R.v. 13, transcript of hearing of April 30, 1984 pp. 162-63.)

B 1E[illegible]

14 App. 167a and 167a n. 39:

"[I]n 1965, after it appeared that all jobs at the plant would have to be opened to persons of all races, Pullman abandoned its earlier practice of offering on-the-job training in welding...."

"A Pullman official admitted that the practice changed because white welders at the Bessemer plant were unwilling to train black employees."

practices are part of a "bona fide" seniority system. Decisions of this Court in the intervening years have repeatedly increased the importance of the section 703(h) exception to Title VII.[15] But although this Court has repeatedly granted certiorari to resolve procedural issues arising under section 703(h), neither Teamsters nor its progeny attempted to delineate when and under what circumstances past discrimination in

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15 United Airlines v. Evans, 431 U.S. 553 (1977), extended the exemption to seniority systems which perpetuate the effect of discrimination occurring after the adoption of Title VII. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), extended the exemption to seniority systems adopted after 1965. California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980), adopted an expansive view of what practices are to be deemed part of a seniority system for purposes of section 703(h).

connection with a seniority system would render that system non bona fide.[16]

In the absence of guidance from this Court, the lower courts have been faced with, and have disagreed about, a number of recurring legal issues concerning the bona fides of a seniority system. The instant petition presents several of the most important of those questions -- (1) Where the bona fides of a seniority system is in dispute, which party bears the burden of proof? (2) When is an intentionally discriminatory seniority practice sufficiently connected to the

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16 In both Teamsters and Evans the plaintiffs conceded that the seniority system at issue was bona fide. Teamsters v. United States, 431 U.S. at 355-56; United Airlines v. Evans, 431 U.S. at 560. In American Tobacco and California Brewers the bona fides of the systems had not yet been tried, and this Court simply directed that that issue be addressed on remand. American Tobacco Co. v. Patterson, 456 U.S. at 77 and n. 18; California Brewers Ass'n v. Bryant, 444 U.S. at 610-611.

seniority system to render that system non-bona fide?[17] (3) If a discriminatory seniority practice is adopted at the behest of a union in order to discriminate against blacks, is the seniority system nonetheless bona fide when enforced by the employer?

The questions posed by the instant case are essentially legal; the courts below either agreed that the particular seniority related practices at issue were racially motivated, or concluded that the disputed seniority system could be upheld without deciding whether the remaining disputed seniority practices were indeed racially motivated. The recurring nature

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17 Because in part of its view on the first two issues, the Eleventh Circuit never resolved whether racially discriminatory intra-departmental seniority practices continued after 1965. Question 4 of the Questions Presented is inextricably intertwined with, and turns on, Questions 1 and 2.

of these issues is illustrated by the fact that arguments touching on all three questions have been raised by the briefs in Lorance v. A.T.& T. Technologies, No. 87-1428.

We set out below the particular circumstances which warrant review of the section 703(h) issues raised by this case. We acknowledge, however, that it may be appropriate to defer action on this petition until the Court has decided Lorance v. A.T. & T. Technologies. The respondents in Lorance maintain that a finding that a seniority system is not bona fide can never be based on the adoption prior to 1965, the effective date of Title VII, of intentionally discriminatory seniority rules or practices.[18] In

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[18] See, e.g., Brief for Respondents, No. 87-1428, p. 41 n. 46:

> "[N]o Title VII claim can be brought unless the facts showing the lack of

the instant case the bona fides of the seniority system turns on the legal significance of four seniority related intentionally discriminatory practices; three of these were adopted prior to the effective date of Title VII.[19] A decision

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> bona fides occurred during the limitations period.... Whatever reasons may have entered into the initial adoption of a seniority system, a neutral system that is maintained and applied free of unlawful discrimination during the limitations period is, under Section 703(h), not a violation of Title VII."

(Emphasis in original). Pre-1965 actions adopting a racially motivated seniority practice necessarily occur outside any Title VII limitations period. Respondents in Lorance insist that this Court's own prior decision in Swint, although apparently concerned with pre-Act discriminatory actions in the adoption of the instant seniority system, "[p]resumably" was concerned in fact only with post-1965 discriminatory practices. Id. at 43.

19 The division of the Maintenance Department and the Die and Tool Department into separate single race seniority units occurred in the 1940's. 624 F.2d at 531. The undisputed practice of allowing only

sustaining the position of respondent in Lorance would not necessarily be controlling in this case, because the underlying claims are significantly different. See pp. 60-62 infra. Nevertheless, it is possible that the decision ultimately rendered in Lorance will bear significantly on the certworthiness of the instant case, or on the propriety of remanding this case to the Eleventh Circuit for reconsideration in the light of Lorance.

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white department members to bid on white jobs in their department was adopted long before 1965. (See p. 11-12, supra). The creation of new single-race departments out of previously integrated USW departments occurred between 1954 and 1965. (See pp. 21-23, supra).

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE BONA FIDES OF A SENIORITY SYSTEM IS CONTROLLED BY ACTUAL SENIORITY PRACTICES, OR TURNS SOLELY ON THE SUBSTANCE OF THE NOMINAL WRITTEN SENIORITY RULES

Until the Eleventh Circuit decision in the instant case, the circuit courts were in agreement that the "seniority system" whose bona fides must be assessed under section 703(h) is the set of actual seniority practices adhered to and utilized by the defendant employer. The Second Circuit in Acha v. Beame, 570 F.2d 57 (2d Cir. 1978), held that although written seniority rules might be facially neutral and have originally been created for non-discriminatory reasons, if in practice those rules were administered in a discriminatory manner the system would

not be bona fide within the meaning of section 703(h):

> Bona fides, in the context of the statute requires, at least in part, that the seniority system be applied fairly and impartially to all employees. . . . A system designed or operated to discriminate on an illegal basis is not a "bona fide" system.

570 F.2d at 64. In Mitchell v Mid-Continent Spring Co., 583 F.2d 275 (6th Cir. 1978), the ostensible rules governing inter-shift transfers made no overt distinctions on the basis of sex. The Sixth Circuit, however, found the seniority system was not bona fide under section 703(h) because other evidence established that, despite the nominally sex-neutral rules, the company in fact maintained separate seniority rosters for men and women, and would only consider transfer requests from male employees. 563 F.2d at 280-81. In Mozee v. Jeff

Boat, Inc., 746 F.2d 365 (7th Cir. 1984), the official seniority policy required promotion of "the most senior 'qualified' employee" seeking each position. The Seventh Circuit held that, in order to ascertain whether the company in fact had a bona fide seniority system, it was necessary to determine "whether there might have been discrimination in the identification of qualified applicants." 746 F.2d at 374. In Wattleton v. International Brotherhood of Boilermakers, 686 F.2d 586 (7th Cir. 1982), the Seventh Circuit held invalid a seniority system on the ground that it had been "operated to discriminate on an illegal basis," citing evidence that blacks had not in practice been permitted to transfer into certain "white" jobs. 686 F.2d at 591-93.

Had this case arisen in the Second, Sixth or Seventh circuits, each of those

circuits would for two distinct reasons have declared Pullman-Standard's seniority system non-bona fide as a matter of law. First, all the lower courts in the instant case have agreed that at least until 1965 the actual seniority system for intra-departmental promotions at Pullman-Standard was to promote the senior white employee if the vacancy were in a white job, and the senior black employee if the vacancy were in a black job. (See pp. 11-12, supra). Had the written seniority rules drawn such racial distinctions, they would of course have been non-bona fide; the Second, Sixth and Seventh Circuits insist that the result is the same regardless of whether, as here, the actual race based seniority rules were not reflected in the nominally race-neutral written seniority rules. Second, in 1965 Pullman-Standard made a fundamental change

in its seniority practices, thereafter refusing to permit an employee to utilize his or her seniority to obtain a promotion unless the worker first obtained training outside the plant, at his or her own initiative, to do the job in question. (See pp. 24-28, supra). Pullman-Standard's officials expressly conceded, and the Eleventh Circuit acknowledged, that this change was the result of white opposition to permitting senior blacks to use their seniority to promote into better paying jobs. (See pp. 27-28, supra). Neither this new limitation on seniority rights, nor the reason for it, were reflected in the written seniority rules; nonetheless, in the Second, Sixth and Seventh Circuits such a racially motivated change in actual seniority rights would also have rendered the system non-bona fide as a matter of law.

The Eleventh Circuit, however, held that as a matter of law these same facts required a conclusion that Pullman-Standard seniority system was bona fide under section 703(h). The Eleventh Circuit reasoned that the "seniority system" at issue was the nominal written seniority system, which was facially neutral and which reflected no 1965 change in seniority rights. To the Eleventh Circuit, the undisputed racial discrimination in the seniority practices was only tangential evidence, and legally insufficient evidence at that, regarding the bona fides of the facially benign system. The two discriminatory seniority practices, the court of appeals insisted, were not themselves part of the seniority system, but constituted merely "manipulation" of the nominal "system."

> [N]one of this evidence goes directly to Pullman's intent

> regarding the system. It tends to prove instead that Pullman engaged in a number of other, separate discriminatory practices ...

(App. 175a) (Emphasis in original).

> For a plaintiff to prevail ... there must be a finding that the system itself was negotiated or maintained with an actual intent to discriminate.

(App. 171a) (Emphasis in original).

> Evidence that the seniority system has been manipulated can certainly be considered in evaluating an employer's intent with respect to the creation or maintenance of a seniority system ... but a system cannot be invalidated on such evidence standing alone.

(App. 171a n. 43) (Emphasis added)

On the Eleventh Circuit's view section 703(h) prohibited a finding of non-bona fides based on evidence, "standing alone," that despite the existence of a nominal, facially neutral written system, the actual seniority practices were deliberately and

pervasively based on the race of the affected employees. Although no other circuit distinguishes in this way between a nominal seniority system, and actual seniority practices, the defendants in Lorance v. AT&T Technologies, No. 87-1428, appear to advocate such an interpretation of Title VII.[20]

The Eleventh Circuit rule conflicts as well with the decisions of this Court. In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the disputed seniority system, as here, was neutral on its face; the Court nonetheless held the seniority rule at issue was unlawful because other evidence demonstrated that in practice it penalized only women. Compare 434 U.S. at

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[20] Respondent's Brief, No. 87-1428, p. 31 n.33 (if "a seniority system was discriminatorily administered ... the relief in such cases is to remedy the particular discrimination, not to dismantle the entire system.")

140 with 434 U.S. at 140 nn.2-3. See also Trans World Airlines v. Hardison, 432 U.S. 63, n. 14 (1977). The distinction adopted by the Eleventh Circuit in this case is an engraved invitation to subterfuge. An employer can pursue race based seniority practices, and simultaneously retain the protections of section 703(h), simply by adopting facially neutral seniority rules which are completely different from its actual racial seniority practices. On the Eleventh Circuit's view of Title VII, the nominal written rules, although frequently or uniformly ignored in practice, would be the real "seniority system", and the actual discriminatory practices would be mere "manipulation", neither inconsistent with section 703(h) nor sufficient by themselves to support a finding that the largely theoretical "seniority system" was not bona fide.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER SECTION 703(H) PROVIDES A "BONA FIDE SENIORITY SYSTEM" DEFENSE TO AN EMPLOYER WHICH AGREES TO AND ENFORCES SENIORITY RULES FRAMED AND PROPOSED BY A UNION FOR THE PURPOSE OF DISCRIMINATING ON THE BASIS OF RACE

The vast majority of the seniority systems in American industry today are established by collective bargaining agreements between employers and unions. Although Teamsters observed that the bona fides of a seniority system would turn on whether the system was created or maintained for a discriminatory purpose, Teamsters did not address how section 703(h) should be interpreted in a case in which an employer and union acted with different motives. Such differences, of course, are common under the collective bargaining process, in which provisions sought and favored by only one party are

agreed to in exchange for provisions sought and favored by the other. The Fourth and Ninth Circuits hold that a racial motive on behalf of either party renders a joint seniority system non-bona fide; the Eleventh Circuit, on the other hand, has expressly rejected that interpretation of section 703(h).

In the instant case the Eleventh Circuit held that a seniority system framed for the purpose of racial discrimination is nonetheless a "bona fide" seniority system when implemented by an employer, if the moving force behind the racial motivated seniority system was a union, and the employer merely agreed to establish and enforce that discriminatory system at the behest of the union. The Eleventh Circuit conceded that "no one can seriously question that IAM" insisted for racial reasons on dividing both the

Maintenance and Die and Tool Departments into two parallel single race departments, and on the adoption of seniority rules that would effectively preclude blacks from transferring into the better paying all-white positions represented by the IAM. (App. 173a). But the Court below insisted that those very seniority rules, when implemented by Pullman-Standard, were "bona fide" because there was no "independent evidence of Pullman's intent with respect to the seniority system." App. 174a.[21] (emphasis added) The Eleventh Circuit expressly held that the company did not lose its ability to invoke the section 703(h) defense merely because it had signed the collective bargaining agreements which contained the provisions designed by the IAM to discriminate against blacks.

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[21] See also App. 172a.

The Eleventh Circuit decision in this case is squarely in conflict with decisions in the Fourth and Ninth Circuits. In Sears v. Atchison, T & S. F. Ry. Co., 645 F.2d 1365 (9th Cir. 1981), the Ninth Circuit held that a union faced liability under Title VII if it was party to a collective bargaining agreement that established a non-bona fide seniority system, regardless of whether the union might have accepted that portion of the agreement for entirely benign reasons.

> A union's role as a party to a collective bargaining agreement may be sufficient to impose back pay liability on the union.[22]
>
> It is unnecessary for us to find that the union entered the agreement with the intention of discriminating. The action of agreeing to the seniority system was nonaccidental and deliberate.[23]

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22 645 F.2d at 1375.

23 645 F.2d at 1375 n.9.

> [T]he union's role in freezing the status quo of a prior discriminatory seniority system, not immunized under section 703(h), renders it liable to those upon whom the seniority system had an adverse impact.[24]

This is, of course, precisely the argument rejected by the Eleventh Circuit in the instant case.

Similarly, the Fourth Circuit in Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), cert dismissed, 404 U.S. 1006 (1971), rejected an employer's argument that an unlawful

> seniority system was only adopted under union pressure, and that, "A company would probably never establish a seniority system of its own accord ..." ... Lorillard's apparent point is that it was forced either to accept the system or endure a strike.... The rights assured by Title VII are not rights that can be bargained away.... Despite the fact that a strike over a contract provision may impose economic costs, if a

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[24] 645 F.2d at 1375.

> discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable.

444 F.2d at 799.

The importance of this issue is illustrated by the briefs in Lorance v A. T. & T. Technologies. The company in that case acknowledged that union discussions of the disputed seniority provision were permeated with statements hostile to respecting the seniority rights of female workers. The company insisted, however, that there was no evidence that its own officials, in agreeing to the provision at issue, had acted from any such motives:

> [I]t [is not] alleged that AT&T knew what had been said at the union meetings much less that anyone from AT&T who negotiated the Tester Concept then acted other than for legitimate business reasons.

Respondent's Brief, No. 87-1428, p. 7.

The decision of the Eleventh Circuit cannot be reconciled with the language of

section 703(h), or with the terms of Teamsters and its progeny. The Eleventh Circuit decision analyzes separately the motives of each party to a collective bargaining agreement, holding in this case that Pullman-Standard acted with bona fides in agreeing to the provisions at issue, while conceding that the IAM did not. But section 703(h), like Teamsters and its progeny, concerns whether a seniority system is bona fide; it flies in the face of the statutory language to hold, as has the Eleventh Circuit in this case, that the self same seniority system is bona fide when administered by Pullman-Standard, but not bona fide if implemented by the IAM.

The distinction created by the Eleventh Circuit would at times virtually nullify enforcement of Title VII. On the Eleventh Circuit's view, because section

703(h) protects employer implementation of a union sponsored racially motivated seniority system, an employee injured by that discriminatory system could not obtain any remedy whatever against the employer. It is typically the case that seniority provisions are largely the creation of a union but are in practice implemented by the company officials who make promotion and layoff decisions. In such circumstances it would be impossible on the Eleventh Circuit's view to enjoin the implementation of a racially motivated seniority system, because the administration by an employer of such a race based system would be lawful under Title VII.[25]

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[25] The Eleventh Circuit thought that this unusual result was required by footnote 23 in this Court's opinion in Pullman-Standard v. Swint, 456 U.S. 273, 292 n.23 (1982), which states in part:

"IAM's discriminatory

> motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the company in creating and maintaining the separate seniority system at issue in this case."

(Emphasis added). This footnote was addressed to the argument, apparently accepted by the Fifth Circuit in its 1981 opinion, that the discriminatory IAM motives underlying the IAM-Pullman-Standard seniority system supported a finding that the separate USW-Pullman-Standard seniority system was also racially motivated. See 624 F.2d at 533. This case also presents a dispute, however, about the legality of the IAM-Pullman-Standard rules which effectively precluded transfers into IAM represented jobs; this Court's 1982 decision does not, of course, suggest that the IAM's motives are irrelevant to the bona fides of the IAM-Pullman-Standard system.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHICH PARTY BEARS THE BURDEN OF PROOF REGARDING WHETHER A DISPUTED SENIORITY SYSTEM IS BONA FIDE

In many instances in which the bona fides of a seniority system is in dispute, it is of critical importance to the resolution of the case whether the plaintiff or the defendant bears the burden of proof. This Court has not previously been asked to resolve this question. There is language in Teamsters and its progeny which appears to support both possible interpretations of section 703(h), and the circuit courts have, as a consequence, disagreed as to which party bears the burden of proof.

The Sixth Circuit construes Teamsters to place the burden of proof under section 703(h) on the defendant. EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981).

> Ball Corporation asserts ... that its promotion and transfer policies qualify as a bona fide seniority system under Section 703(h) of Title VII.... In Teamsters ... the Supreme Court held that Section 703(h) exempts from Title VII liability those "neutral, legitimate system[s]" that do not have [their] genesis in racial ... discrimination and that ... "[were] negotiated and ... maintained free from any illegal purpose." 431 U.S. at 353-56 .... Thus, if an employer shows that differences in pay or employment conditions result from the operation of a bona fide seniority system, the plaintiff's prima facie case is effectively rebutted.
>
> Ball Corporation made no such showing below.

661 F.2d at 538-39. (Emphasis added). In Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988), the Fifth Circuit described the issue raised by a seniority system that perpetuated past discrimination to be whether "the defendants failed to prove that the seniority system was bona fide under section 703(h)." 841 F.2d at 551, 554. The Third, Fourth and

Seventh Circuits hold that the burden of proof is on the defendant to establish bona fides under the section 4(f)(2) of the ADEA which, like section 703(h), creates an exemption for bona fide seniority and other systems.[26]

The Eleventh Circuit adheres to an unusual hybrid rule contrary to the standard in the other circuits. On the one hand, the Eleventh Circuit recognizes that section 703(h) creates an affirmative defense. Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th Cir. 1982).[27]

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[26] EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 223 (3d Cir. 1983); Smart v. Porter Paint Co., 630 F.2d 490, 493 (7th Cir. 1980); Crosland v. Charlotte Eye, Ear and Throat Hosp., 686 F.2d 208, 213 (4th Cir. 1982).

[27] "The [union] ... claims as error that the district court did not find and the appellees failed to prove that the alleged discrimination did not result from the normal operation of a bona fide seniority system protected from attack under

On the other hand, the Eleventh Circuit also holds that once a defendant has merely pled the existence of a section 703(h) affirmative defense, the burden of

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> section 703(h).... The district court held that the [union] waived its right to advance this claim by failing to plead it as an affirmative defense under Ref. R. Civ. P. 8(c). We agree....
>
> [S]everal courts have held that the section 703(h) exemption is in the nature of an affirmative defense.... [T]he courts have generally treated statutory exemptions from remedial statutes as affirmative defenses.... [R]equiring the section 703(h) exemption to be pled as an affirmative defense promotes fairness. It places the burden of pleading on the party who will be benefitted by the departure from the normal operation of Title VII, and permits plaintiffs to proceed without the undue burden of having to anticipate a section 703(h) defense by stating in their complaint that the challenged discrimination is not the result of a bona fide seniority system.... [W]e hold that the section 703(h) exemption for bona fide seniority systems constitutes an affirmative defense."

688 F.2d at 1012-13.

proof is on the plaintiff to disprove that defense: "the burden of persuading the district court that a system is the product of an employer's discriminatory intent lies with the plaintiff." (App. 172a).

The Fourth Circuit has expressly recognized that there is a conflict among the lower courts as to which party bears the burden of proof under section 703(h), but that circuit has refused to decide which rule is correct. Gantlin v. West Virginia Pulp and Paper Co., 734 F.2d 980, 992-93 (4th Cir. 1984). Somewhat paradoxically, the Fourth Circuit panel in Gantlin criticized the district judge in that case for having himself failed to address the burden of proof issue under section 703(h), which it emphasized was both a "critical" and "open" question. 734 F.2d at 993 n.20.

The decisions of this Court contain language which provides support for both sides of this intercircuit conflict. On the one hand, as the Sixth Circuit emphasized, Teamsters repeatedly described section 703(h) as an exemption which "immunized" seniority practices that would otherwise have been illegal under Title VII. 431 U.S. at 345, 349, 350, 353. Ordinarily "the burden of proof is on ... one [who] claims the benefits of an exception to the prohibition of a statute". United States v. First City Nat. Bank, 386 U.S. 361, 366 (1967). In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court held that the burden of proof was on the defendant to demonstrate the existence of a business justification for a seniority system which had the

effect of discriminating against women.[28] This Court has expressly held that the seniority system exceptions to the Age Discrimination in Employment Act and the Equal Pay Act, both extremely similar to section 703(h), are affirmative defenses. County of Washington v. Gunther, 452 U.S. 161 (1981); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). The normal rule is that a defendant bears the burden of proof with regard to factual issues raised by an affirmative defense. 2A Moore's Federal Practice, p. 8-177, 8-179. On the other hand, as the Eleventh Circuit noted in the instant case, some

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[28] 434 U.S. at 143:

> "[W]e agree with the District Court in this case that since there was no proof of any business necessity adduced with respect to the policies in question, that court was entitled to 'assume no justification exists.'"

passages in the Teamsters progeny do suggest that the plaintiff bears the burden of proof on this issue. Trans. World Airlines, Inc., v. Hardison, 432 U.S. 63, 82 n. 13 (1977).

This very dispute is evident in the briefs in Lorance v. A.T & T. Technologies, No. 87-1428. The respondents there assume that a challenge to a seniority system requires that the plaintiff prove that the system was or is racially motivated. (Respondents' Brief, No. 87-1428, passim). The Solicitor General, on the other hand, evidently construes Title VII in the opposite way, describing the plaintiffs' allegations in Lorance that the seniority system was racially motivated as "simply meeting a possible defense to their discrimination claim." (Brief for the United States, No. 87-1428, p. 20 n. 26) (Emphasis added.)

The conflict among the lower courts, and the uncertainty generated by this Court's opinions, exist in part because disputes about the racial purpose of a seniority system in fact arise under Title VII in three quite distinct circumstances. (a) In some cases, as in Teamsters, the plaintiff complains that the seniority system has the effect of perpetuating past discrimination, and the defendant asserts section 703(h) as an affirmative defense. That is the posture of the instant case,[29] and is the situation in which the Fifth and Sixth Circuits, but not the Eleventh, place the burden of proof on the defendant; (b) In some cases, as appears to be the situation in Lorance, the

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[29] The respondents in Lorance insisted that the disputed seniority rule in that case neither perpetuated any past discrimination nor had any net adverse impact on women. Brief for Respondents, No. 87-1428, p. 3 n. 2, p. 16 n. 18.

gravamen of the plaintiffs complaint is that a particular seniority practice, whatever its net effect, was adopted or maintained for an illegal purpose. In such a case the plaintiff may well bear the burden of proof of racial purpose, not because of section 703(h), but because the case presents a garden variety claim that a particular practice (which happens to be a seniority practice) is racially motivated; (c) In some instances, whether effect cases like Teamsters or an intent case like Lorance, the plaintiff may prove that the disputed seniority system or practice was in the past created or maintained with a discriminatory purpose; in that situation the burden of proof would ordinarily be on the defendant to demonstrate that discriminatory purpose, and its ongoing effects, had been eliminated. See Keyes v. School District

No. 1, 413 U.S. 189 (1973). That circumstance is also presented by the instant case.[30] The very complexity of these overlapping questions is likely, absent clarification by this Court, to spawn even greater conflict and confusion.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Eleventh Circuit. In the alternative, it may be appropriate to defer action on this petition pending the decision by this Court in Lorance v. A. T & T. Technologies.

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[30] The lower courts agreed that , at least until 1965, there was in practice a race-based seniority system for intra-departmental promotions. See pp. 11-12, supra. When, if at all, that racial seniority practice ended remains a matter of dispute, and was not definitively resolved by the courts below. See pp. 12-15, supra.

Respectfully submitted,

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APPENDIX

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD, Bessemer, Alabama, United Steelworkers of America, Local 1466, United Steelworkers of America AFL-CIO and International Association of Machinists and Aerospace Workers, AFL-CIO, Defendants-Appellees.

No. 78-2449.

United States Court of Appeals, Fifth Circuit.*

Dec. 6, 1982.

As Corrected April 4, 1983.

Appeal from the United States District Court for the Northern District of Alabama.

ON REMAND FROM THE SUPREME COURT COURT OF THE UNITED STATES

Before RONEY and HATCHETT, Circuit Judges, and WISDOM, Senior Circuit Judge.

PER CURIAM:

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* Former Fifth Circuit Case, section 9(1) of Public Law 96 - 452- October 14, 1980.

This employment discrimination action's first journey to this court resulted in a remand to the district court for further proceedings with respect to Pullman-Standard's seniority system and its selection of supervisory personnel. Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976). Subsequently, the district court held that the seniority system did not discriminate against blacks and was therefore bona fide under 42 U.S.C. § 2000e-2(h), that Pullman-Standard did not follow a discriminatory practice or policy in job assignments after the effective date of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-1(a), and that Pullman-Standard had rebutted the plaintiff's prima facie case of discrimination in the selection of supervisory personnel. We reversed and held that: (1) although the statistics

disclosed that Pullman-Standard had made significant advancements in eliminating previous all-black and all-white departments subsequent to 1966, the total employment picture revealed that racially discriminatory assignments were made after the effective date of Title VII; (2) Pullman-Standard's department seniority system was not "bona fide" within the meaning of section 703(h) of Title VII, 42 U.S.C.A. 2000e-2(h); and (3) the plaintiffs' prima facie showing of racial discrimination in the selection of supervisory personnel had not been rebutted. Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980).

The United States Supreme Court granted certiorari to review the seniority system issue, reversed the judgment of this court, and remanded the case to us "for further proceedings consistent with

this opinion." ___ U.S. ___, ___, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66, 82 (1982). Accordingly, we VACATE our judgment as to this issue and REMAND the case to the district court for further proceedings to determine what impact the "locking-in" of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system, and any other proceedings that may be deemed necessary in view of our prior opinion and that of the United States Supreme Court.

REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

LOUIS SWINT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs.-	)	No. CV 71-P-0955-S
PULLMAN-STANDARD, et al.,	)	
	)	
Defendants.		

OPINION

(Pullman-Standard IX)

For decision are certain issues still at "Phase I" after fifteen years of litigation. The first trial was conducted in 1974; additional evidentiary hearings were held in 1977, 1978, and 1984. Although a detailed recital of the prior proceedings in the trial and appellate courts is unnecessary, reference must be made from time to time to these earlier

opinions.[1] Pullman-Standard ceased its operation in Alabama more than five years ago; however -- absent settlement or providential intervention -- this litigation appears destined for yet further hearings and decisions.

I. SCOPE OF INQUIRY

Before proceeding to questions of liability, the court must define the scope of this inquiry -- that is, the proper anterior (beginning) and posterior (ending) cut-off dates of this liability period and the appropriate class definition.

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[1] Pullman-Standard I, 11 FEP Cases 943 (N.D. Ala. 1974; Pullman-Standard II, 539 F.2d 77 (5th Cir. 1976); Pullman-Standard III, 15 FEP Cases 1638 (N.D. Ala. 1977); Pullman-Standard IV, 15 FEP Cases 144 (N.D. Ala. 1977); Pullman-Standard V, 17 FEP Cases 730 (N.D. Ala. 1978); Pullman-Standard VI, 624 F.2d 525 (5th Cir. 1980); Pullman-Standard VII, 456 U.S. 273 (1982); Pullman-Standard VIII, 692 F.2d 1031 (5th Cir. 1983).

A. Anterior Cut-off Date.[2]

The question of the anterior cut-off is intertwined with, and complicated by, motions to intervene by four putative class members and the existence of a Title VII charge filed on March 27, 1967, by Commissioner Shulman of the Equal Employment Opportunity Commission. Plaintiffs contend that this intervention should be allowed, and that the anterior date should be set by reference to the EEOC charge filed on October 30, 1966, by one of the proposed intervenors, Spurgeon Seals. In the alternative, they argue that Commissioner Shulman's charge should be the date designator. Defendants maintain that the anterior date should be

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[2] Typically, the anterior cut-off for class membership and for the liability period are the same. Case law referring to the beginning date of membership in a class usually also refers to the beginning of the liability period and is relevant to the instant discussion.

measured by reference to October 15, 1969, the filing date of the charge of Louis Swint, the named plaintiff and class representative during the past 15 years. The court agrees with the defendants.[3]

Some factual background is necessary for an understanding of the attempted intervention. On December 9, 1975, a separate suit was filed in this district by William Larkin, Spurgeon Seals, Edward Lofton, and Jesse Terry against Pullman-Standard for redress of alleged Title VII violations. Pullman-Standard I was already on appeal to the Fifth Circuit at the time this new suit (Larkin) was filed. On January 20, 1976, Larkin was dismissed

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[3] The Fifth Circuit has succinctly stated the law: "The opening date for membership in a class for a Title VII claim should be set by reference to the earliest charge filed by a named plaintiff." Payne v. Travenol Laboratories, 673 F.2d 798, 813 (5th Cir. 1982).

by the judge to whom it had been assigned, holding that the plaintiffs were putative class members in Pullman-Standard and that their interests were adequately protected by class representatives in Pullman-Standard. Eight years later, on March 23, 1984, the plaintiffs in Larkin filed a motion to alter or clarify this dismissal. The motion was denied on April 16, 1984, with the judge adhering to his prior ruling and rationale.

On June 4, 1984, Larkin, Seals, Lofton, and Terry moved to intervene in the present case. This motion was denied on September 4, 1984.[4]

Intervention under Rule 24 of the Federal Rules of Civil Procedure, whether

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[4] At the same time, the court denied a motion that had been filed in February 24, 1984, seeking to designate Seals as a class representative in Pullman-Standard, even though at the time he was neither a party nor an intervenor.

"of right" or "permissive," may be granted only upon "timely application." The rule is silent as to what constitutes a timely application, and this determination has long been held to be within the sounds discretion of the trial court. McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1071 (5th Cir. 1970). The court must balance the competing interests of the parties and weigh any possible prejudicial effects intervention would create. With respect to permissive intervention, the court is explicitly directed to "consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties." FED. R. CIV. P. 24(b). This consideration is primary in the court's determination. WRIGHT 7 MILLER, FEDERAL PRACTICE AND PROCEDURE § 1913. All circumstances of the case are to be examined, particularly whether the

would-be intervenor was in a position to have requested intervention at any earlier time. Id. at §§ 1913, 1916.[5]

In the case at bar, the would-be intervenors were explicitly informed by the opinion issued in Larkin on January 20, 1976, of the existence of Pullman-Standard and of their interest in it.[6] No attempt was made to intervene in Pullman-Standard until 1984, after the case had twice been resubmitted for final

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[5] See also Howard v. McLucas, 782 F.2d 956, 959 (11th Cir. 1986); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970).

[6] The court here picks a date certain, although, in all likelihood, the intervenors knew of Pullman-Standard and their interest in it no later than the date the Larkin complaint was filed. Their attorneys were the same as those for plaintiffs in Pullman-Standard, and these attorneys obviously had knowledge of the relation between the two cases. The court, however, will not indulge in speculation as to what information was communicated between attorneys and clients, but will make findings only on that evidence which is squarely before it.

decision. In light of the would-be intervenors' knowledge, eight years is an unreasonable time to delay in taking action purportedly necessary to protect their rights. Such a belated effort is untimely by the most lenient standards. Even absent any legal bar to such an attempt, the equitable concept of laches dictates that the motion be denied. Inexcusable delay, lack of diligence, and prejudice to the defendants justify this application of laches. Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 373 (1977).

Allowing intervention would arguably broaden the temporal scope of the case, potentially increasing the liability of the defendants fifteen years after the case was filed. There has been no showing that denial of intervention would unfairly prejudice the would-be intervenors, who,

as the case now stands, are class members whose interests are being adequately protected by the class representatives. They will hardly be deprived of their "day in court," as plaintiffs contend. The intervention motions were made only after the original plaintiffs had secured a partial decision in favor of the class; absent a showing of significant prejudice to the applicants and sound justification for their inordinate delay in seeking intervention, the court finds no basis for granting such motions.

Plaintiffs have alternatively moved that EEOC Commissioner Shulman's charge of March 27, 1967, be used as the date designator for beginning the period of liability. This motion should likewise be denied.

Although the Commissioner's charge did allege some of the same violations of

Title VII as are alleged in the instant case, it did not list any of the named plaintiffs or would-be intervenors as aggrieved or charging parties.[7] It did not progress beyond internal EEOC level. There were findings of fact issued[8] and an EEOC decision made which found reasonable cause to believe that respondents had engaged in unlawful employment practices.[9]

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[7] The Commissioner's charge, as such, was never introduced into evidence. The findings of fact and the EEOC decision based on it were.

[8] The findings of fact were entered into evidence as Plaintiffs' Exhibit 60 in the 1974 hearing. Pullman-Standard and the USW Local and ALF-CIO were named as respondents. These findings, although of evidentiary value, are not binding on the court in its de novo consideration of a Title VII action. See also EEOC Decision 72-1704, page 3.

[9] The decision was entered into evidence as Plaintiff's Exhibit 58. For purposes of rendering a decision, the EEOC consolidated Commissioner Shulman's charges and the charges filed by Terry, Lofton, Seals, and Larkin.

A decision finding reasonable cause under the then-existing EEOC guidelines meant only that the matter merited an attempt to conciliate, not that it was substantial enough to be litigated.[10] 1454 BNA Daily Labor Report, E-1, et seq. (July 27, 1977). No evidence was presented at any of the hearings before this court to show that this charge proceeded beyond this point. No evidence of conciliation or recommendation to the Attorney General to litigate the cause was brought forth.[11]

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[10] On July 20, 1977, the EEOC adopted a resolution modifying this policy. The standard of review was changed so that a finding of reasonable cause was thenceforth to indicate that a claim merited litigation if conciliation failed. The decision whether to litigate was to e made by the Commission. EEOC Compliance Manual § 30.1.

[11] At the time this charge was filed, the EEOC did not have the power to bring suit eo nomine, but it did have the authority to recommend the filing of suit by the Attorney General of the United

The EEOC has sought neither litigation of the Commissioner's charge nor intervention in the case sub judice.[12] It is only at plaintiffs' instance that this charge has been raised for the court's consideration. Plaintiffs' motion on this point is without merit. The Commissioner's charge is analogous to a private EEOC charge which was not pursued

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States. Public Law 88-352. § 705(g)(6) of the Civil Rights Act of 1964.

[12] Under the present law, the EEOC's power to bring suit is not subject to statutory time limitations. 42 U.S.C. § 2000e5(f)(1), as amended. See Occidental Life Insurance Company v. EEOC, 432 U.S. 355 (1977); EEOC v. Guaranty Savings & Loan Association, 561 F.2d 1135, 1137 (5th Cir. 1978); EEOC v. Griffin Wheel Co., 511 F.2d 456, 457 (5th Cir. 1975). The court, however, does maintain the authority to reach a just result where defendant would be prejudiced by plaintiffs' inordinate delay in bringing suit. This inherent power of the court applies to actions involving the EEOC just as it does to suits by private litigants. Occidental Life, 432 U.S. at 373. An attempt by EEOC to bring suit to intervene at this point would be viewed as untimely by the court.

through the administrative process into the courts. It retains no legal significance and has no bearing on the instant case's temporal boundaries. It has died of old age and neglect.

Having decided that Louis Swint's charge of October 15, 1969, controls the anterior cut-off in this suit, the court must now decide how many days prior to this charge the liability period will include. The law as originally enacted provided a ninety-day period. Public Law 88-352, Civil Rights Act of 1964. An amendment enacted on March 24, 1972, extended this period to 180 days. 42 U.S.C. 2000e-5(e).

Swint's charge was filed on October 15, 1969, and the EEOC issued a right-to-sue letter on September 21, 1971. The charge did not complain of a violation occurring within 180 days of enactment of

the 1972 amendment nor was it pending before the EEOC on or after the amendment's enactment.[13]

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[13] Section 14 of Public Law 92-261 provided that: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to the charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter."

The bare language of the 1972 amendment has been broadened somewhat by judicial interpretation in regard to what constitutes a timely complaint. The Supreme Court has allowed an action filed 180 days after the alleged violation to go forward, because it occurred within 180 days prior to the effective date of the amendment. The law at the time of filing required filing within 90 days of the violation. International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, inc., 429 U.S. 229 (1976). The Ninth Circuit has held that it was not critical for the alleged violation to have occurred within 180 days of the amendment if the charge were still pending before the EEOC on or after the amendment's effective date. Inda v. United Airlines, 565 F.2d 554 (9th Cir. 1977).

The question here, however, is not whether Swint's complaint was timely filed. The class's temporal scope cannot be expanded by an attempt to analogize

In the opinion of the court, the proper anterior cut-off is ninety days prior to the filing of Swint's EEOC charge.[14] Accordingly, the period of potential liability commenced July 17, 1969.

B. Posterior Cut-Off.

In its 1980 opinion, the Fifth Circuit of Appeals found liability on certain class claims but did not define the liability periods.[15] Pullman-Standard VI, 624 F.2d 525 (5th Cir. 1980). In

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these holdings to the situation now before the court.

[14] See Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir. 1982).

[15] The Supreme Court subsequently granted certiorari regarding the bona fides of the seniority system and reversed the Fifth Circuit on its finding of liability on that issue. Pullman-Standard VII, 456 U.S. 273 (1982). The seniority system issue is before the court foe determination of liability. The period of liability would need to be defined if liability were found.

1983, the Circuit remanded the cause to this court for proceedings in conformity with its 1980 opinion and the intervening Supreme Court opinion. Pullman-Standard VIII, 692 F.2d 1031; Pullman-Standard VII, 456 U.S. 273. Much of the task now before this court is to determine the ending dates for violations found to exist by the Circuit.

In the pretrial order of September 19, 1983, this court rejected defendants' position that claims of liability after 1974 were untenable. The plaintiffs were allowed at the 1984 hearing to present evidence of liability up to the date of that hearing.

Due to the complexity of the case, the court must determine appropriate posterior cut-off dates for each class claim separately. This issue will be

addressed on that basis in subsequent portions of this opinion.

C. Class Definition.

The class definition established in the pretrial order of June 5, 1974, remains in effect. The order states that "[T]his action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to any charges under Title VII) been employed by defendant company as production or maintenance employees represented by the United Steelworkers."[16]

II. DISCRIMINATORY SELECTION OF SUPERVISORY PERSONNEL

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[16] Arguably, this definition should be redrafted to conform to the limits imposed by the court's rulings regarding the cut-off dates. The result, however, would be the same with or without this change. Limits on recovery by members of the class are clearly laid out in the body of this opinion. As this case moves into Phase II, this opinion must be looked to in its entirety for limitations on the scope of liability.

The Court of Appeals in Pullman-Standard VI reversed this court's finding that the company had successfully rebutted plaintiff's prima facie case of racial discrimination in the selection of supervisory personnel after the effective date of Title VII. This ruling was not reviewed by the Supreme Court in Pullman-Standard VI or vacated by the appellate court in Pullman-Standard VIII.[17] Accordingly, it is to be treated, despite the company's protest, as the law of the case. At the 1984 hearing, no additional evidence was offered with respect to claims of discrimination in the appointment of supervisory personnel after 1974, and the court accordingly denied any claim with respect to this issue after

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[17] Pullman-Standard VI, 624 F.2d 525 (5th Cir. 1980); Pullman-Standard VII, 456 U.S. 273 (1982); Pullman-Standard VIII, 692 F.2d 1031 (5th Cir. 1983).

that point. 1984 Hearing Transcript, Vol. I, 5. As to these claims, therefore, the defendant company is subject to liability upon proof of damages at a Phase II hearing for the period from July 17, 1969, until August 16, 1974.

III. SENIORITY SYSTEM

Pursuant to the opinions of the Supreme Court in Pullman-Standard VII and the Fifth Circuit in Pullman-Standard VIII, this court has considered afresh the bona fides of the United Steel Workers' seniority system at Pullman-Standard.[18] A

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[18] The Supreme Court reversed the Fifth Circuit's judgment regarding the bona fides of the seniority system, and remanded the case to that court for further proceedings consistent with the Supreme Court opinion. Pullman-Standard VII, 456 U.S. 273 (1982). The Fifth Circuit, in turn, vacated its prior judgment regarding this issue, and remanded the case to this court "for further proceedings to determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the

three-day evidentiary hearing was held in 1984 to allow the presentation of exceptional additional evidence and newly discovered evidence. A broad range of evidence was presented. Anecdotal and expert witnesses testified; statistical exhibits and depositions were received. Post-trial briefs were submitted. The evidence introduced at this hearing, as well as the evidence previously in the record, has been considered by the court in making its determination regarding the validity of the seniority system. The essential facts relating to this seniority system were outlined in Pullman-Standard V, 17 FEP Cases 732-39, and need not be

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discriminatory motivations of IAM with respect to the institution of USW's seniority system...." Pullman-Standard VIII, 692 F.2d at 1031-32.

repeated, but are adopted by reference as findings of the court.

The Fifth Circuit specifically instructed this court to address the effect of the IAM's discriminatory motivation on the institution of USW's seniority system.[19] Plaintiffs argue that the racial animus of the IAM should be imputed to the USW. Such a finding would be contrary to the evidence taken as a whole. The IAM's discriminatory behavior is detailed in Pullman-Standard V.[20] In addition to the evidence discussed therein, extensive testimony and

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[19] Pullman-Standard VII, 692 F.2d 1031 (5th Cir. 1983).

[20] 17 FEP 730 (N.D.Ala. 1978). In addition to the conduct described therein, the IAM also followed a policy under its printed ritual (in effect until 1948) of allowing only '"qualified white candidates" to be proposed for membership. Joint Appendix to Writs for Certiorari, 346. (Plaintiffs' request for judicial notice of adjudicative facts.)

deposition evidence were presented at the 1984 hearing which established that blacks were involved in the formation of the USW and the negotiation of its 1954 contract.[21] The evidence, both at the 1984 hearing and at earlier hearings, indicates that the USW desired to represent all maintenance and production workers at Pullman-Standard regardless of race. The IAM's motives cannot fairly be imputed to the USW. Even if USW's acquiescence in IAM's discriminatory conduct were shown, it would not be

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[21] Deposition of Joseph Jeneske, USW international representative at the 1954 contract negotiations. Defendants' Exhibit 1301, 1984 Hearing. See also 1984 Hearing Transcript, Vol. II, 4-5. Rosters of USW officers from 1965 through 1973 showed extensive involvement of blacks in leadership of the union. Joint Appendix for Writs of Certiorari, 66-89 (copy of Co. Ex. 309). Also, the anecdotal evidence throughout this case's long history has alluded repeatedly to blacks' active role in the formation and leadership of the union.

equivalent to discriminatory purpose on the part of the USW. Pullman-Standard VII, 456 U.S. at 293, n. 23.

In Pullman-Standard VII, the United States Supreme Court stated the applicable standard regarding discriminatory intent:

> Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by Section 703(h) may be presumed from such an impact. As Section 703(h) was construed in Teamsters, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to be a pure question of fact.

Pullman-Standard VII, 456 U.S. at 80. This court finds no intent to discriminate on the part of the USW.[22]

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[22] Inequities did exist, but the court finds that they resulted ultimately from the initial assignments made by the company.

The Fifth Circuit further instructed this court "to determine what impact the 'locking-in' of blacks to the least remunerative department had on discouraging transfer between seniority units." Pullman-Standard VIII, 692 F.2d at 1031. The Fifth Circuit had previously concluded that the assignment of blacks in a racially discriminatory manner to the least remunerative departments did not cease on the effective date of Title VII. Pullman-Standard VI, 624 F.2d 525 (5th Cir. 1980). These assignments, however, were the province of the company, not the union.

Any "locking-in" effect produced by the departmental seniority system was felt equally blacks and whites until 1972. In 1972, an agreement between the company and the Office of Federal Contract Compliance gave certain advantages to specified

groups of black employees in regard to interdepartmental transfers.[23] This agreement sought to correct inequities created by discrimination in initial assignments, not inequities in the application of the seniority system. Evidence showed that reluctance to transfer between departments turned on facts extraneous to Title VII issues, such as skill levels and personal preference.

Whether a seniority system is bona fide in a Title VII context is controlled by International Brotherhood of Teamsters v. United States.[24] That case applied a four-pronged test to the seniority system

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[23] Memorandum of Agreement (between Pullman-Standard and the United States Department of Labor, OFCC, May 19, 1972), Defendants' Exhibits 272, 1974 Hearing.

[24] 431 U.S. 324 (1977).

under scrutiny.[25] In Pullman-Standard V, this court used these guidelines and considered the totality of the circumstances in its detailed analysis of the USW's system. Nothing presented at the 1984 hearing has changed the court's opinion that the seniority system sub judice is bona fide and falls within the immunity provisions of Section 703(h) of

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[25] At the 1984 hearing, plaintiffs attempted to embark on a new theory to invalidate the seniority system. The presentation centered on dual application of the seniority system. Plaintiffs' attorneys were permitted to voice their theory at length and to question two witnesses extensively on this issue, The court then stated, "The problem [here] is that that is the identical evidence the Court called for and heard back in 1977 and '78, and the only thing we are doing here is supplementing [the record] if there is some unusual or exceptional reason why some evidence couldn't have been received back at that time." 1984 Hearing, Transcript Vol. II, 48. Given this case's lengthy history and the sample opportunity previously afforded plaintiffs to present evidence of all types, this attempt was untimely and beyond the clearly defined scope of the 1984 hearing.

the Civil Rights Act. The defendants have successfully carried their burden of showing that the seniority system is bona fide, and that the differences caused thereunder were not the result of any intent to discriminate on the basis of race.

Having considered the totality of the evidence presented at the various hearings and all submissions of counsel, the court finds that USW's seniority system at Pullman-Standard was bona fide under the terms of Section 703(h) of the Civil Rights Act.

IV. DISCRIMINATORY DEPARTMENTAL ASSIGNMENTS.

The court of appeals in Pullman-Standard VI reversed the court's finding that the company had not made racially discriminatory initial job assignments

after the effective date of Title VII.[26] This ruling was not reviewed by the Supreme Court in Pullman-Standard VII or vacated by the appellate court in Pullman-Standard VIII.[27] Accordingly, it is to be treated, despite the company's protests, as the law of the case. Establishing the date this practice ceased is the task left to this court.

Both sides have presented reams of statistical evidence on this issue. The courts and legal scholars have expressed many common sense caveats concerning the use of statistics in Title VII cases. Statistics showing racial imbalance are probative of discriminatory conduct. They

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[26] 624 F.2d 525 (5th Cir. 1980).

[27] Pullman-Standard VII, 456 U.S. 273 (1982); Pullman-Standard VIII, 692 F.2d 1031 (5th Cir. 1983).

are not, however, irrefutable.[28] In most instances, infirmities and omissions in statistical evidence affect its probative value not its admissibility. Bazemore v. Friday, --- U.S. ---, 106 S.Ct. 3000 (1986). The court should not consider statistical evidence in a vacuum,[29] and, indeed, should be cognizant of the potential for manipulation of statistics in Title VII cases. These cases all too frequently develop into "contests between college professor statisticians who revel in discoursing about advanced statistical theory." Otero v. Mesa County Valley School District No. 51, 470 F. Supp. 326,

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[28] Defendants' rebuttal may take various forms. They may impeach the reliability of the evidence, offer rebuttal evidence, or bring into question the probative value of plaintiff's evidence. Dothard v. Rawlinson, 433 U.S. 321, 338-39 (1977) (Rehnquist, J., concurring).

[29] See Teamsters, 431 U.S. at 340.

331 (D.Colo. 1979), aff'd, 628 F.2d 1271 (10th Cir. 1980).[30] Analysis of statistical evidence requires attention to the precise questions addressed by the statistics. The limits of statistical tests in supporting causal inferences must be recognized.[31] In the case at bar, intrinsic non-quantitative evidence concerning the selection process has been considered in conjunction with the statistical evidence from both sides.

The statistical evidence was generally divided into two time periods--

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[30] See Schlei & Grossman, Employment Discrimination Law (1983) Supplement, 166); Richey, Charles, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts, A-29 (August 1985)

[31] Baldus & Cole, Statistical Proof of Discrimination, § 9.42. The Fifth Circuit Court of Appeals has cautioned the courts to give "close scrutiny [to the] empirical proof" on which statistical models are based. Pettway v. American Cast Iron Co., 494 F.2d 211, 230-32, n.44 (5th Cir. 1974).

1964 to 1969 and 1969 to 1974. As might be expected, the defendants' and plaintiffs' experts took different statistical approaches and arrived at somewhat conflicting conclusions. The court carefully studied the evidence presented by the parties and at trial presented to the parties for their comment another standard statistical model.[32] Plaintiffs' expert acknowledged that a considerable change had taken place in the job class distribution by 1969.[33] Defendants' expert found a statistical difference between the pre-1969 and post-1969 periods, with a rough parity between the races in terms of job class assign-

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32 Court's Exhibit 1, 1984 Hearing.

33 1984 Hearing Transcript, Volume I, 90.

ments from 1969 forward.[34] The alternative study prepared by the court indicated that post-1969 assignments were not racially tainted.

An extrinsic event ties in with and bolsters this statistical evidence as to a change in early 1969. In 1968, negotiations were begun between the company and the Department of Labor. In January 1969, the company agreed to a conditional memorandum of understanding designed to enhance opportunities for Pullman's black employees.[35] This agreement put into

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[34] 1984 Hearing Transcript, Volume II, 165 (testimony of Robert Herrick in reference to Company's Exhibit 1208, pages 5-7).

[35] This agreement was never termed official because the union never voted its approval. Nevertheless, the company put in place programs which affected real changes in policy. As was stated in Pullman-Standard I:

> The memorandum contained provisions similar to those later incorporated in the 1972

motion the engines of change. The company cast its contract compliance officers--one black and one white -- in the role of equal employment counselors. They encourage blacks in "low ceiling" department to transfer to other departments, monitored the filling of temporary vacancies to insure fair allotment to blacks, and encouraged black employees and their families to take advantage of the company's vocational education tuition program.[36]

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agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[36] The vocational education program allowed employees and their families to obtain outside training and education at the company's expense. This program was particularly significant in the training of black welders. Id. at 947.

Based on the statistical and non-statistical evidence, the court finds that Pullman-Standard's practice of making racially discriminatory initial job assignments ceased as of February 1969. The changes reflected by the evidence at that point were not mere tokenism. These changes were substantial and legally significant.[37] Since the period of liability in this case does not commence until July 17, 1969, the effect of this

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[37] The question of legal significance is ultimately one for the court, rather than an expert witness, to decide. The court must integrate the circumstances with the statistics. Mere technical statistical significance may or may not amount to legal significance, depending on the surrounding facts. Baldus & Cole, Statistical Proof of Discrimination, §§ 9.22, 9.41. "[T]he levels of significance required of a claimant may vary from one subject matter area to another under the same legal theory, and ... the required level of significance is a question of law to be decided by the court and not an expert witness." Id. at § 9.41.

ruling is that the company faces no liability on these claims.

V. CONCLUSION

Based on the foregoing discussion, the court finds and concludes as follows:

1 The period of potential liability commenced on July 17, 1969.

2. Plaintiffs' motion that Commissioner Schulman's charge of March 27, 1967, be used as the date designator for the opening of the class is denied.

3. The class definition remains as stated in the pretrial order of June 5, 1974, but with liability periods for affected subclasses as outlined in this opinion.

4. Regarding discriminatory selection of supervisory personnel, the defendant company is subject to liability upon proof of damages at Phase II proceedings from July 17, 1969, until August 16, 1974.

5. The USW seniority system is bona fide. Judgment is entered in favor of the defendants on claims of discrimination wrought by the seniority system.

6. Regarding plaintiffs' claims of racially discriminatory initial job assignments, judgment is entered in favor of defendant company.

SO ORDERED.

This the 8th day of September, 1986.

Sgd. Sam C. Pointer, Jr.

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LOUIS SWINT, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No.CV 71-P-0955-S
	)	
PULLMAN-STANDARD, et al.	)	
	)	
Defendants.	)	

Memorandum of Opinion

This cause is before the court on a variety of post-judgment motions by both parties. All concerned would like to lay this case to its final rest, but, unfortunately, this is not yet to be. Despite the frustrations involved in taking another appeal, both sides and this court agree that appellate review and guidance would be beneficial prior to proceeding into Phase II on the issue of discriminatory supervisory promotions.

Turning first to plaintiffs' motions, the court is presented with amotion under Fed.R.Civ.P. 59(e) to alter or amend its judgment of September 8, 1986, regarding the statute of limitations applicable to the issues of initial assignments, supervisory promotion, and, to the extent they are successful on appeal in regard to it, the seniority system.[1] The plaintiffs would have the court abandon the law of the case and apply a six year statute of limitations via retroactive application of Wilson v. Garcia and adherence to Miller v. Hall's Birmingham Wholesale Florist

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[1] Plaintiffs have not sought a Rule 59 amendment of judgment on the seniority system issue, but they do seek entry of a final judgment pursuant to Rule 54(b) on all issues decided adversely to plaintiffs and plaintiff class. The court presumes that plaintiffs would seek the same broad period of liability to apply to all of their claims. The court finds it appropriate that final judgment be entered regarding its rulings concerning the seniority system, and that they be reviewed by the appellate court.

and, tangentially, to Jones v. Preuitt v. Maudlin.[2]

The Supreme Court in Wilson ruled that each state was to choose one statute of limitations as applicable to all Section 1983 actions arising in that state. The Court hopes to achieve uniformity, certainty, and minimization of unnecessary litigation by mandating the abandonment of case-by-case selection of statute of limitations in the civil rights arena. Wilson v. Garcia, 471 U.S. 261 (1985), aff'g Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984). It must be noted that the very day it decided Wilson the Tenth Circuit declined to apply Wilson

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[2] Wilson v. Garcia, 471 U.S. 261 (1985), aff'g Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984). Miller v. Hall's Birmingham Wholesale Florist, 640 F.Supp. 948, (N.D. Ala. 1986). Jones v. Preuitt v. Mauldin, 763 F.2d 1250 (11th Cir. 1985), on remand, 634 F.Supp. 1520 (N.D. Ala. 1986).

retroactively. The Tenth Circuit specifically ruled that Wilson be applied prospectively only. Jackson v. Bloomfield,731 F.2d 652, 653-55 (10th Cir. 1984)(en banc).

The Eleventh Circuit and, subsequently, the district court in Jones applied Alabama's six year statute of limitations for trespass, Code of Alabama §6-2-34(1), to actions brought under 42 U.S.C. §1983. Jones v. Preuitt & Maudlin, 763 F.2d 1250 (11th Cir. 1985), on remand, 634 F.Supp. 1520 (N.D. Ala. 1986).

In July 1986, the district court in Miller applied this same six year statute to an action brought under 42 U.S.C. §1981. The ruling in Miller has not undergone appellate review as of the date of this opinion, therefore, the Eleventh Circuit has not declared its opinion concerning the correctness of this posi-

tion. Miller v. Hall's Birmingham Wholesale Florist, 640 F.Supp. 948 (N.D.Ala. 1986).

In the case at bar, the one year statute of limitations was incorporated into the case definition in the pretrial order. It was explicitly stated in Pullman-Standard I by this court. The Fifth Circuit repeated this limitation in both Pullman-Standard II and Pullman-Standard VI with no adverse comment.[3] All claims brought under 42 U.S.C. S1981 which arose outside the one year period have been denied by this court's rulings. This time restriction was never the subject of appeal, and, thus, became the law of the case. Defendants have relied on this statute of limitations throughout this

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[3] Pullman-Standard I, 11 FEP Cases 943, 948, n.20 (N.D. Ala. 1974); Pullman-Standard II, 539 F.2d 77, 85, n.17 (5th Cir. 1976); Pullman-Standard VI, 624 F.2d 525, 526 (5th Cir. 1980).

case's long history. Nothing plaintiffs have presented has persuaded this court that this reliance was unfounded, that retroactive application of Wilson and Miller is proper[4] of that there are valid grounds for diverging from the law of the case.[5]

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[4] The Eleventh Circuit has applied Wilson retrospectively to a 42 U.S.C. § 1983 claim in Williams v. City of Atlanta, 794 F.2d 624, 627-28 (11th Cir. 1986). The appellate court clearly stated that it found this application proper because the plaintiffs had no precedent for waiting more than two years to file suit (the longest period which had been applied in Georgia for a Section 1983 claim for money damages). Plaintiffs had not relied upon any ruling of the court in their suit to the contrary nor upon any other precedent. The case at bar is clearly distinguishable by the defendants' long years of reliance on the one year statute of limitations.

[5] See Leggett v. Badger, 798 F.2d 1387 (11th Cir. 1986); Stanley v. United States, 786 F.2d 1490, 1498 (11th Cir. 1986); Dorsey v. Continental Casualty Company, 730 F.2d 675, 678 (11th Cir. 1984); and 1B Moore's Fed. Prac. ¶ 0.404.

The applicability of the six year statute of limitations to 42 U.S.C. §1981 actions in Alabama is still a debatable issue, particularly in cases which were litigated prior to Wilson and Miller.[6] The equities in the case at bar militate convincingly toward strict adherence to the law of the case doctrine on this issue. The parties have relied throughout the case's fifteen year life on the one year statute of limitations as dictated by

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[6] In the interest of achieving the uniformity, certainty, and minimization of unnecessary litigation sought by the Supreme Court through its opinion in Wilson, the Eleventh Circuit has stated that "[t]he same single limitations period should apply to §1981 claims [as applies to §1983 claims]. Goodman v. Lukens Steel Company, 777 F.2d 113, 120 (3d Cir.1985)." Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1503, n.2 (11th Cir. 1986). The court has no quarrel with this proposition, but it does not agree that the ruling in Miller should be retroactively applied in knee-jerk fashion.

Section 6-2-39(a)(5) of the Alabama Code.[7] This provision had been applied to Section 1981 actions by federal courts in Alabama before Miller was decided. Ingram v. Steven Robert Corp., 547 F.2d 1260, 1263 (5th Cir. 1977); Buckner v. Goodyear Tire & Rubber Company, 476 F.2d 1287 (5th Cir. 1973), aff'g 339 F.Supp. 1108 (N.D. Ala. 1972).[8]

The Supreme Court has established a three-part analysis for considering retroactive application of judicial decisions.

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[7] This section was repealed in 1985, and replaced by Ala. Code §6-2-38 which provides a two-year statue of limitations.

[8] See also Ray v. TVA, 677 F.2d 818, 822 (11th Cir. 1982), cert denied, 459 U.S. 1147 (1983)(A Veterans Preference Act case in which the court states that Alabama's one year statute of limitations is not so short as to frustrate federal policy); Watkins v. Scott Paper Co., 530 F.2d 1159, 1196 (5th Cir.), cert denied, 429 U.S. 861 (1976)(A title VII backpay case which applied the one-year statute of limitations).

Chevron Oil v. Huson, 404 U.S. 97, 106-07 (1971).[9] The final factor of weighing likely resultant inequities and hardships is the most persuasive in the instant case. After careful consideration of all facts, the court finds that substantial inequity, hardship, and injustice would result from retroactive application of Wilson and Miller. The plaintiffs' motion for alteration or amended of judgment under Fed.R.Civ.P. 59(e), therefore, is DENIED.

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[9] The court stated: (1) "[T]o be applied nonretroactively [the decision] must establish a new principle of law either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed ...." (2) The history of the rule, its purposes, and whether retrospective application would further or retard its operation must be considered. (3) The inequity, hardship, and injustice that would result from retroactivity must be weighed.

The plaintiffs have further moved for entry of final judgment under Fed.R.Civ.P. 54(b) of all rulings decided adversely to them and to the plaintiff class. The court finds this request appropriate, except as to those rulings which relate to the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974. The court's denial of plaintiffs' Rule 59 motion regarding the appropriate statute of limitations in no way impedes plaintiffs' right to appeal that issue. The plaintiffs' motion for entry of final judgment under Fed.R.Civ.P. 54(b) is GRANTED, subject to the aforementioned exception.

Defendant, Pullman-Standard, has made motions to alter or amend the judgment under Fed.R.Civ.O. 52(b) and 59(e). The company contends that there has never been a finding of intentional discrimination in

its selection of supervisory personnel. The Fifth Circuit specifically found that the company had failed to rebut plaintiffs' prima facie case regarding racially discriminatory selection of supervisory personnel. Pullman-Standard VI, 624 F.2d 525, 536 (5th Cir. 1980). This issue was not a subject of the Supreme Court appeal, and, thus, became the law of the case. Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986); Dorsey v. Continental Casualty Co., 730 F.2d 675 (11th Cir. 1986). The court finds that this holding is ripe for Phase II proceedings, and that the plaintiffs will not be required to prove intentional discrimination by the company at this point. Defendant Company's motions under Fed.R.Civ.P. 52(b) and 59(e) are DENIED.

Defendant company has moved in the alternative for leave to appeal this issue

under 28 USC §1291(b). Defendant has further moved for leave to appeal under that section the issue of whether named plaintiffs have standing to represent class members claiming discriminatory initial job assignments. The court finds that there are controlling questions of law as to which there is substantial ground for difference of opinion regarding: (1) its holding that there has been a finding of intentional discrimination in the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974, and that defendant company is subject to potential liability at a Phase II hearing with respect to such claims, and (2) the issue of whether named plaintiffs have standing to represent class members claiming discriminatory initial job assignments. The court further finds that immediate appeal of

these issues may materially advance the ultimate termination of this litigation, and recommends that the court of appeals permit said appeal. Motion for leave to appeal these issues is GRANTED.

An order in conformity with this opinion will be entered contemporaneously herewith.

This the 25th day of November 1986.

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LOUIS SWINT, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No.CV 71-P-0955-S
	)	
PULLMAN-STANDARD, et al.	)	
	)	
Defendants.	)	

ORDER

In accordance with the Opinion filed concurrently herewith, this court's opinion entered September 8, 1986, is hereby AMENDED in the manner described herein. The final sentence of the paragraph beginning on page eleven and ending on page twelve is to read:

> In the case at bar, extrinsic nonquantitative evidence, concerning the selection process has been considered in conjunction with the statistical evidence from both sides.

In all other respects, the court's order and opinion entered September 8, 1986, are hereby RATIFIED and REAFFIRMED in their entirety.

It is FURTHER ORDERED:

1. Plaintiffs' Motion to Alter or Amend Judgment pursuant to FRCP 59(c) is hereby DENIED.

2. Defendant, Pullman-Standard's, Motion to Alter or Amend the Judgment pursuant to FRCP 52(b) ad 59(e) is hereby DENIED.

3. The court finds that there is no just reason for delaying entry of final judgment on the claims decided adversely to plaintiffs and the plaintiff class in the court's decision of September 8, 1986, being all claims except those relating to the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974. The plaintiffs' motion for entry of final judgment on these isues pursuant to FRCP 54(b) is hereby GRANTED. It is further ORDERED that final judgment be ENTERED denying all claims of the plaintiffs and the plaintiff class except those relating to selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974.

4. The court finds there to be a controlling question of law as to which there is substantial ground for difference of opinion regarding this court's holding that there has been a finding of intentional discrimination in the selection of supervisory personnel during the period from July 17, 1969, to August 16, 1974, and that the defendant company is subject to potention liability at a Phase II hearing with respect to such claims. The court further finds that immediate appeal of this issue may materially advance the ultimate termination of this litigation. Therefore, the defendant's motion for leave to appeal under 28 U.S.C. § 1292 is hereby GRANTED with the recommendation of this court that the Court of Appeals permit said appeal.

5. The court is of the opinion that there is substantial ground for difference of opinion regarding the named plaintiffs' standing to represent class members claiming discriminatory initial job assignments during the period from July 17, 1969, to August 16, 1974. The court further finds that immediate appeal of this issue may materially advance the ultimate termination of this litigation. Thus, leave to appeal this issue of standing is hereby GRANTED

pursuant to 28 U.S.C. § 1292 with the recommendation of this court that the Court of Appeals permit said appeal.

This the 25th day of November 1986.

(sgd.) Sam C. Pointer

William B. LARKIN; Louise Seals, as personal representative of Spurgeon Seals, deceased; Lillie Lofton, as personal representative of Edward Lofton, deceased; Jesse B. Terry, on behalf of himself and others similarly situated, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD DIVISION, PULLMAN, INC., a corporation, Defendant-Appellee.

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated; Clyde Humphrey, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD, Bessemer, Alabama; United Steelworkers of America Local 1466; and United Steelworkers of America, AFL-CIO, International Association of Machinists, Defendants-Appellees.

Louis SWINT, and Willie James Johnson, on behalf of themselves and others similarly situated; Clyde Humphrey, Plaintiffs-Appellees,

v.

PULLMAN-STANDARD, Bessemer, Alabama
Defendant-Appellant

United Steelworkers of America Local 1466; and United Steelworkers of America, AFL-CIO, International Association of Machinists, Defendants.

Nos. 84-7319, 86-7886 and 87-7057.

United States Court of Appeals,
Eleventh Circuit.

Sept. 21, 1988

Appeals from the United States District Court for the Northern District of Alabama.

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

CLARK, Circuit Judge:

Few cases better represent the idea that the road to justice can be a long and tortured one. The class action giving rise to two of these three consolidated appeals was filed in 1971. The named plaintiffs, Louis Swint and Willie Johnson (the "Swint plaintiffs"), alleged that Pullman-Standard, Inc. (Pullman) the United Steelworkers, and United Steel-

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

workers Local 1466 (collectively USW) had engaged in a number of racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1982),[1] and 42 U.S.C. §1981 (1982).[2] Since the

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[1] Title VII provides that

(a) It shall be an unlawful employment practice for an employer -

(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a)(1982).

[2] Section 1981 provides that

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal

complaint was filed, many members of the plaintiff class have died, and our consideration of the case marks its fourth appearance before this court. Both sides have appealed certain aspects of the district court's decision.

A related suit, from which the remaining appeal arises, was filed in 1975. The plaintiffs in that suit- William Larkin, Spurgeon Seals, Edward Lofton, and Jesse Terry (the "Larkin plaintiffs") - brought similar charges against Pullman, and our consideration of their case marks its second appearance here. The Larkin plaintiffs appeal a separate district court's decision in favor of Pullman.

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benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Regretting that we cannot resolve the case in its entirety, we affirm in part and reverse in part the Swint district court decision, and affirm the Larkin district court decision.

I. The Factual Background

Both the Swint and Larkin lawsuits challenge employment practices at Pullman's Bessemer, Alabama plant before it closed in 1980. Employees at the plant during the general[3] time frame covered by the complaints were drawn from twenty-eight departments, each department covering roughly a particular phase of Pullman's manufacture of railroad cars. Pursuant to collective bargaining agreements with the two unions, two of the departments were represented by the

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[3] It is necessary to refer to the general time period because, as will be come apparent later, the time period covered by the complaints is very much at issue.

International Association of Machinists (IAM); and the remaining twenty-six by USW.[4] The agreements were different, but they had one important provision in common: seniority, the primary factor upon which promotions were based, was not transferable between the various departments,[5] at least prior to 1972.[6] If an

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[4] Because IAM was not named in any of the EEOC charges or in Swint's complaint, the union is in the case as a defendant only to the extent that some of the relief sought by the plaintiffs might entail modification of its contract with Pullman. For this reason, any further references to "the union" will be to USW unless otherwise specifically noted.

[5] USW's agreement provided that seniority meant continuous service in a single department. IAM's seniority system was even more restricted. Seniority meant continuous service in the same type of job, i.e. millwrights got credit only for the time they had been millwrights. Because the agreements differed with respect to what constituted seniority, we shall refer to Pullman's overall seniority system as "nontransferable" rather than "departmental."

employee transferred to another department, he[7] lost his seniority.

A. Assignments and Promotions

There is little dispute that prior to 1965, there were both segregated departments and mixed-race departments. Four USW departments - Die & Tool, Janitor, Steel Miscellaneous, and Truck - were all black. Five USW departments - Air Brake, Inspection, Plant Protection, Powerhouse, and Template - and the two IAM departments - Die & Tool and Maintenance - were all

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[6] Pullman entered into an agreement with the Department of Labor's Office of Federal Contract Compliance in 1972 that permitted certain blacks to transfer to certain other departments without losing their seniority. See infra part I.A.

[7] There were twenty or so women working at the Bessemer plant in the late sixties-early seventies. However, because the workforce was predominantly male, and to prevent the reader's distraction, the masculine gender of pronouns will be used in this opinion.

white.[8] There were also, within each mixed-race department, "white" jobs and "black" jobs, meaning that when a particular job was vacated, it was necessarily filled with an employee of the same race. The "white" jobs tended to be the higher-paying, and the "black" jobs the lower-paying. Within the USW departments, in addition to the racial division of job assignments, there were specific pay-skill levels, each represented by a job class (JC) number. The JC number reflected the highest level of skill at which an employee had demonstrated he could work, and it determined what the employee's base pay would be.

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[8] Although the two unions' reasons for doing so are disputed, it is not disputed that agreements between IAM and USW's predecessor, the Steel Workers Organizing Committee (SWOC), in the 1940's resulted in IAM trading its twenty-four black members for two of SWOC's white members.

Both before and after 1965, when a person was hired, he was assigned to both a department and a particular job. The job assignment would set the employee's JC level. Under the collective bargaining agreement, promotions to higher JC-level jobs were to be awarded on the basis of seniority (which in effect meant they were intradepartmental only), provided that the employee could actually perform the work and that the position was not filled from the outside. The highest JC level an employee could achieve within his department varied with the department. In the all-black departments, the maximum JC level varied from 8-20.[9] Vacancies were not announced or posted. Pullman supervisors would choose the employee to fill

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[9] These JC level figures refer exclusively to the USW departments.

the position or make the determination to hire from the outside.

In 1965, after an arbitration decision had opened up the previously all-white riveter job to blacks, some changes began to take place. The system of non-transferable seniority and promotions remained in place,[10] but a reporting system of hires and promotions was developed, and Pullman expressed its desire to recruit blacks for the highly-skilled positions. Unfortunately, at the same time, Pullman terminated its practice of offering on-the-job training and began to require that employees wanting to move to a higher skill level demonstrate that they had formal outside training or experience.

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[10] As will be discussed in more detail later, see infra part V, the parties dispute whether the practice of reserving certain intradepartmental jobs for whites and others for blacks continued after 1965.

In January 1969, Pullman entered a conditional memorandum of understanding with the Department of Labor's Office of Federal Contract Compliance (OFCC) that it would encourage blacks to move from "low-ceiling" departments (where the highest JC level available was still quite low) to higher-ceiling ones. Pullman also agreed to offer at the company's expense, and encourage black employees to take part in, a program of outside vocational education. The memorandum, however, did not officially become effective because the union did not approve it. In May 1972, Pullman entered another agreement with OFCC that allowed blacks who were hired into the four traditionally black departments prior to April 30, 1965 to transfer into any department without losing their seniority. Additionally, any black whatsoever hired prior to April 30, 1965 was permitted to

transfer to one of the five traditionally white departments without losing his seniority. The transfers, of course, were dependent on there being a vacancy in the department to which an employee wished to transfer. Seventeen blacks used this agreement to transfer, though it, like the 1969 memorandum, was not formally adopted by the unions.

B. Selection of Supervisors

The selection of supervisors, both before and after 1965, was not based on seniority. There were four levels of supervisors: "hourly foremen," who alternated between regular and supervisory work; "A foremen," the lowest-level salaried employees; "B foremen"; and Department Heads. These positions were considered within Pullman's (rather than USW's) purview. The B foremen would select the hourly and A foremen, and the

Department Head would select the B foremen. The selections were based on the relevant supervisor's subjective evaluations of the employees, which were in turn based on what Pullman calls "objective" criteria, such as the ability to get along with other employees and knowledge of the particular department's operations. Foremen were not necessarily drawn from the department they would ultimately supervise.

II. The Litigation

A. The EEOC Proceedings

After Title VII became effective in June of 1965, the Equal Employment Opportunity Commission (EEOC) received several charges complaining that Pullman had engaged in racially discriminatory employment practices. Five of these charges are

relevant here. On November 4, 1966,[11] Spurgeon Seals, a Larkin plaintiff, filed a charge alleging that he had been passed over for a better paying job in spite of his seniority. On March 27, 1967, EEOC Commissioner Stephen Shulman filed a charge alleging that Pullman discriminated against blacks in its hiring and promotional practices. On April 11, 1967, Spurgeon Seals, Edward Lofton and Jesse Terry filed a document that they styled an "amendment" to Seals' 1966 charge. To Seals' specific complaint that he was

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[11] There is some confusion about this date. The copy of the charge that appears in the record indicates that it was signed October 30, 1966, but there is no indication of the filing date. Because documents filed by Pullman with the EEOC argue that the charge was filed on November 4, and, at least at one point, the plaintiffs' brief so indicates, we will assume that November 4 is the actual filing date. In any event, our disposition of this charge renders any dispute over the date insignificant. See infra note 32.

passed over, they added allegations that white employees in their department were (1) disproportionately assigned to those jobs that would lead to the higher-paying positions, (2) disproportionately selected for temporary assignments that would prove an employee's ability to perform in a higher position, and (3) given the easier and cleaner work. On October 13, 1967, William Larkin filed a charge alleging that Pullman discriminated in its hiring and promotional practices. Finally, on October 15, 1969, Louis Swint filed a charge alleging that Pullman discriminated in its training and promotional practices.[12]

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[12] This summary of the EEOC charges does not include any claim that the parties have agreed are no longer in the case, e.g., the claims that Pullman physicians maintained racially segregated facilities. Nor does it include later charges filed by Swint, because those charges are not relevant to the issues before the court.

The EEOC consolidated all of the charges other than Swint's, and on April 26, 1972, issued its decision. The Commission concluded that there was reasonable cause to believe that Pullman had discriminated in "hiring, promotion, job assignments, terms and conditions of employment and the operation of an unlawful seniority system." Swint's charge appears not to have been similarly resolved. On September 22, 1971, before disposing of the case and at the request of Swint's attorney, the Commission issued Swint a letter advising him that he could institute a civil action within thirty days.

B. The Swint Case

Swint did so, seeking injunctive, declaratory, and monetary relief on behalf of himself and all other similarly situated black Pullman employees. His

complaint, as amended, alleged that Pullman and USW (to the extent that the latter participated in a particular practice or was a party to a discriminatory practice because it was embodied in the collective bargaining agreement) had practiced racial discrimination in hiring, training, temporary assignments, promotions, and the maintenance of the seniority system.[13] On June 4, 1974, in an order following the second pretrial conference, the district court certified the class Swint sought to represent:

> [T]he court finds and concludes that the prerequisites of Rule 23(a) and Rule 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or

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[13] As with the summary of the EEOC charges, this summary of Swint's allegations omits certain allegations that have no bearing on the issues before the court.

maintenance employees represented by the United Steelworkers.

Record, Vol.II, Tab 18 at 1. According to the court, the parties had "made known certain facts to the court and ... agreed that such facts may be considered by the court without formal hearing otherwise required under Rule 23." Id.

After sixteen days of trial testimony and the submission of numerous exhibits, the district court concluded that the plaintiffs had not proven that the seniority system of promotions was unlawful or that the selection of supervisors was discriminatory. See Swint v. Pullman-Standard (Swint I), 11 F.E.P. 943, 954, 959 (N.D.Ala. 1974) [available on WESTLAW, 1974 WL 262]. However, in the course of its discussion of the seniority system, the court found that, insofar as Pullman had maintained some single-race departments, it had discriminated in its

assignments of new employees until as late as 1972, See id. at 953-54. The district court held that the proper remedy for this discrimination was to expand the transfer eligibility made available by the OFCC agreement.[14] See id. at 954.

On appeal, this court reversed the district court's conclusions on the seniority system and the selection of

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[14] As noted above, the OFCC agreement provided that any black hired prior to April 30, 1965 and assigned to one of four all-black departments could transfer to any department without losing his seniority. The district court directed Pullman to set the eligibility dates (dates of employment) later with respect to three of the four black departments, so that the eligibility dates would correspond with the date on which discriminatory assignments to each of those three departments ended. The OFCC agreement also provided that any black employee hired prior to April 30, 1965 could transfer to one of the four all-white departments without losing his seniority. The district court directed Pullman to again move the eligibility dates later insofar as a black employee wanted to transfer to one of three departments that remained all white until well after 1965.

supervisors. See Swint v. Pullman-Standard (Swint II), 539 F.2d 77, 93, 104 (5th Cir. 1976). With respect to the seniority system, the court found that the district court had erroneously required the plaintiffs to prove that the discriminatory initial assignments caused class-wide economic harm. See id. at 93. Segregation in and of itself, the court held, constituted discrimination in violation of Title VII, and if the seniority system perpetuated such discrimination,[15] it, and promotions pursuant to it, also would violate Title VII. See id. at 91. With respect to the selection of super-

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[15] Swint II was decided prior to the Supreme Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). As will be discussed, Teamsters reversed this circuit's holdings that any seniority system that perpetuated past discrimination could not be bona fide and thus protected under 42 U.S.C. §2000e-2(h)(1982).

visors, the court found that two of the four grounds for the district court's decision were invalid.[16] See id. at 104. The case was remanded for whatever proceedings the district court felt were "appropriate or necessary" to comply with the opinion. Id. at 105.

On remand, a two-day hearing was held, at which additional evidence and briefs were submitted. While the district court was considering its decision, the Supreme Court issued its decision in International Brotherhood of Teamsters v.

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[16] The court held that the district court should not have treated literacy as the explanation for the racial discrepancy unless it had been proven a business necessity. The court also rejected the district court's reliance on his conclusion that pre-1965 discrimination had prevented blacks from gaining the skill and experience they needed to be able to supervise. That justification would have been valid, the court held, only if Pullman had shown that the skills were a business necessity and that blacks did in fact lack them. See Swint II, 539 F.2d at 104.

United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The Court rejected what had become this circuit's standard approach to seniority systems. See, e.g., United States v. T.I.M.E.-D.C., 517 F.2d 299, 320 (5th Cir. 1975)(collecting cases), rev'd sub nom. International Brotherhood of Teamsters v. United States, 431 U.S. at 324, 97 S.Ct. at 1843; Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 987-88 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970). Plaintiffs could not prevail, the Court held, simply by showing that a seniority system perpetuated the effects of pre-Title VII discrimination. See Teamsters, 431 U.S. at 353-54, 97 S.Ct. at 1864. To overcome the bona fide seniority system exception, see 42 U.S.C. §2000e-2(h)(1982), plaintiffs had to show that a seniority

system was established or maintained with discrimi-natory intent. See Teamsters, 431 U.S. at 356, 97 S.Ct. at 1865; see also Trans World Airlines v. Hardison, 432 U.S. 63, 82, 97 S.Ct. 2264, 2275, 53 L.Ed.2d 113 (1977).

Relying on Teamsters, the district court again held for Pullman on the promotions issue. See Swint v. Pullman-Standard (Swint III), 15 F.E.P. 144, 147 (N.D.Ala. 1977)[available on WESTLAW, 1977 WL 888]. Realizing that it would have to focus on post-Act discrimination, the court assumed that the liability period should be dated from December 27, 1966: "To give plaintiffs' [sic] the benefit of the doubt, the court has in this opinion used the earliest possible date, i.e., 90 days before the March 27, 1967 Commissioner's charge, while nevertheless having substantial reservations that such a date

is proper." Id. at 146 n.5. It then found that by December 1966 the company was no longer making assignments to departments based on race. The court acknowledged that this finding conflicted with its findings in Swint I, but concluded that its original decision, "based largely upon a mechanical application of statistical data respecting a few departments, was incorrect." Id. at 149. The court also held that Pullman had not discriminated in its selection of supervisors. The court's calculations revealed no statistically significant disparity in the number of blacks and whites chosen,[17]

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[17] The court found that "the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen." Swint III, 15 F.E.P. at 151. The court acknowledged that there was a disparity of "some 2.54 standard deviations" in the Welding department, by far the largest department at the plant.

and, in any event, Pullman had demonstrated that experience as a temporary foreman - which, due to pre-Act discrimination blacks were less likely to have - was a bona fide occupational qualification. See id. at 150-52.

The plaintiffs filed a motion to amend the judgment with respect to the court's language on the date from which Pullman's liability was measured. They argued that the liability period should have been backdated from the Commissioner's charge 180 rather than 90 days, due to a 1972 amendment to Title VII that extended the time for filing. The court wrote that "[p]laintiffs are probably correct," but found that even if a September date were used, its finding that Pullman had not discriminated during the liability period would stand. Swint v. Pullman-Standard (Swint IV), 15 F.E.P.

1638, 1639 (N.D.Ala. 1977) [available on WESTLAW, 1977 WL 40]. The plaintiffs also asked for a new trial on the seniority system on the ground that they had proceeded on trial on an accepted theory that Teamsters reversed. The court granted that motion. See id. at 1640.

The evidence presented at the third trial did not alter the district court's conclusion. Operating under the four-factor framework this court had set forth (after Teamsters) in James v. Stockham Valve & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978), the court held that three of the factors as well as the totality of the circumstances indicated that the seniority system did not reflect an intent to discriminate. See Swint v. Pullman-Standard (Swint V), 17 F.E.P. 730, 739 (N.D.Ala. 1978)[available

on WESTLAW, 1978 WL 115]. The court was unimpressed with the plaintiffs' showing that blacks appeared to be locked into the least economically desirable departments, asserting that this court had precluded any consideration of economic unfairness:

> [t]he rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to measure its opposite - equality or neutrality - without reference to such desirability.

Id. at 734.

On appeal, this court reversed and remanded "for proceedings necessary to render appropriate relief." Swint v. Pullman-Standard (Swint VI), 624 F.2d 525, 526 (5th Cir. 1980). In independent sections of its opinion, the court held that Pullman had violated Title VII in its assignments to departments, its system of nontransferable seniority, and its selec-

tion of supervisors. With respect to departmental assignments, the court cited several numerical mistakes in the district court's calculations and concluded that the district court's ruling was "factually unsubstantiated." See id. at 529. With respect to the seniority system, the court found several errors in the district court's analysis. First, the district court had been unreasonable in construing Swint II to preclude any consideration of the fact that blacks were relegated to the economically undesirable departments; Swint II merely held that discrimination could take a non-economic form as well as an economic one. See id. at 530-31. Second, the district court had no basis on which to find the seniority system rational: "[n]o credible explanation has been advanced to sufficiently justify the separate seniority units." Id. at 531,

533. Third, the district court improperly rejected any consideration of IAM's role in the creation of nontransferable seniority, given IAM's undisputed past efforts to exclude blacks from its bargaining units. Id.; see supra note 8. On the last issue, the selection of supervisors, the court found that Pullman had failed to show that requiring salaried supervisors to come from the ranks of the temporary supervisors was a business necessity. The court noted further that Pullman had not articulated any particular skills necessary to performing as either a

temporary or salaried supervisor.[18] See Swint VI, 624 F.2d at 535-36.

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[18] Despite holding that the plaintiffs were entitled to judgment in their favor on all three liability issues, the court did not specify the time period for which Pullman was liable. Its only discussion of the EEOC charges was as follows:

> Although the first primary charge directly bringing into question the company's assignment policies was filed on May 11, 1970, a charge had been previously filed by an EEOC Commissioner on March 27, 1967 questioning the hiring and promotion practices of Pullman. Because the district court found this earlier charge to be susceptible to the interpretation that it related also to assignment and transfer matters, the court used the date 90 days before the March 27, 1967 Commission charge for its analysis.
>
> The 1972 amendment to Title VII extended the time for filing charges to 180 days, and this extension has been considered to be effective retroactively .... But, the district court asserts that it finds there was no practice of discrimination assignments to departments after September 28, 1966. The 180 day statutory period is inconsequential to this analysis.

Swint VI, 624 F.2d at 528 n.1.

The Supreme Court granted certiorari to consider the seniority system issue and reversed. See Pullman-Standard v. Swint (Swint VII), 456 U.S. 273, 102 S.Ct.1781, 72 L.Ed.2d 66 (1982). The majority held that this court, despite stating that it was applying a clearly erroneous standard to the district court's finding of no intentional discrimination, had improperly weighed the evidence and entered factual findings of its own. The proper procedure would have been to review the record only for clear error and then remand to the district court for reconsideration. Id. at 292, 102 S.Ct. at 1792. The Court did not specify the aspects of Swint VI that it considered fact-finding.

The opinion remanding the case to the district court directed it to conduct whatever proceedings it felt necessary to comply with Swint VI and Swint VII and "to

determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system." Swint v. Pullman-Standard (Swint VIII), 692 F.2d 1031, 1031-32 (5th Cir. 1982). A fourth trial was held, and the district court entered the decisions that gave rise to two of these appeals. See Swint v. Pullman-Standard (Swint IX), No. CV71-P-0955-S, slip. op. (N.D.Ala. Sept. 8, 1986), Record, Vol. II, Tab 136. Without discussion, the court concluded that it was bound by Swint VI to find Pullman liable for discriminating both in its departmental assignments and in its selection of supervisors. Swint IX, slip op. at 8, 11. The court rejected Pullman's argument that Swint did not have

standing to represent the class on the departmental assignment claim. On the promotions issue, however, the court found the seniority system bona fide and entered judgment in favor of Pullman and USW. See id. at 11.

In view of its ruling that there had been discrimination in departmental assignments and the selection of supervisors, the court was faced squarely with defining the temporal scope of Pullman's liability. Relying on Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982), the court held that the liability period should be dated from ninety days prior to the date of Swint's first EEOC charge, i.e., Pullman would not be liable for any discrimination

occurring prior to July 17, 1969.[19] See Swint IX, slip op. at 6. The court then found that any discrimination in departmental assignments ended prior to February 1969. See id. at 13. The bottom line was that there was no discrimination in departmental assignments for which Pullman would have to pay damages. The date on which discrimination in the selection of supervisors ended, the court held, had in effect been set by Swint VI. Pullman

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[19] The plaintiffs filed a motion to alter or amend the judgment asking the court to apply Alabama six-year trespass statute of limitations to the section 1981 claims in their case. This would have, at least to the extent that the plaintiffs were able to show intentional discrimination (which section 1981 claims require), worked to extend the liability period backward to 1965. The court refused to alter its previous application of the one-year trespass on the case statute, citing a Pullman's reliance throughout the litiga-tion on that decision. Swint v. Pullman-Standard (Swint X), No. CV71-P-0955-S, slip op. at 3 (N.D.Ala. Nov. 26, 1986), Record, Vol. II, Tab 136 at 3.

would be liable for discrimination in the selection of supervisors from July 16, 1969 to August 16, 1974.[20] See id. at 8.

The plaintiffs appeal the rulings against them on the seniority system, the date from which Pullman's liability was measured, and the date that discrimination in departmental assignments ended. Pullman, having been granted leave to appeal immediately under 28 U.S.C. §1292 (1982), appeals the rulings against it on the selection of supervisors and on Louis Swint's standing to represent the class

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[20] It is unclear how the district court arrived at the August 16 date. 1974 appears to have been chosen because the plaintiffs had presented statistical evidence through that date and this court did not distinguish periods of time when, in Swint VI, it found that there had been discrimination. See Swint IX, slip op. at 8.

with respect to departmental assignments.[21]

C. The Larkin Case

Some four years after Louis Swint filed suit against Pullman and USW, on December 9, 1975, the Larkin plaintiffs filed a class action against Pullman alone. The complaint alleged that Pullman had excluded blacks from its desirable jobs and departments and its salaried foremen jobs. On January 20, 1976, the district court dismissed the Larkin case with prejudice, finding "that all issues presented by the complaint are presently on appeal to the Fifth Circuit Court of Appeals in the case of Louis Swint, ... and that plaintiffs herein are included in

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[21] USW remains in the case only as an appellee, because the only issue still disputed and involving USW is whether or not the seniority system was bona fide rather than intentionally discriminatory. For that reason, the bulk of this opinion will refer to Pullman alone.

the putative class of plaintiffs on whose behalf said appeal was taken." Larkin v. Pullman-Standard Division, Pullman, Inc. (Larkin I), No. 75-G-2266-S slip op. at 1 (N.D.Ala. Jan. 20, 1976), Record, Vol. I, Tab 4, at 1. The Larkin plaintiffs appealed, but the appeal was ultimately dismissed for failure to prosecute. Larkin v. Pullman-Standard Division, Pullman, Inc. (Larkin II), No. 76-1538, slip op. at 1 (5th Cir. Apr. 15, 1976), Record, Vol. 1, Tab 6, at 1.

Nothing further happened in the Larkin case for several years. In June 1983, however, after this court in Swint VIII remanded the Swint litigation to the district court, Pullman began urging the Swint district court to consider running the liability period from a later date, as of 1969 rather than 1966. Pullman argued that the beginning of the liability period

could be based only on the charge of a named plaintiff, i.e., on Louis Swint's October 1969 charge. Concerned that such a decision would preclude consideration of claims that the Larkin court had dismissed precisely because they were to be considered in Swint, the Swint plaintiffs moved, in February 1984, to add Spurgeon Seals (a Larkin plaintiff who had filed his EEOC charge on November 4, 1966) as an additional named plaintiff. A motion to add all of the Larkin plaintiffs as named Swint plaintiffs was filed on June 4, 1984.

Pullman allegedly[22] opposed the motions to add the Larkin plaintiffs on the ground that Larkin I, which included the language, "dismissed with prejudice,"

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[22] It appears that Pullman did not file a written response to the plaintiffs' motions to add the Larkin plaintiffs, so we have been unable to verify that Pullman actually made this argument.

constituted an adjudication on the merits that prevented the Larkin plaintiffs from pursuing any of their claims against Pullman in Swint. The Larkin plaintiffs responded by returning to the Larkin court and filing a motion for relief from judgment under Fed.R.Civ.P.60(a) or 60(b)(6). The plaintiffs asked the court to delete the words "with prejudice" from the Larkin I order. "[R]eluctant to alter in any way an order of judgment which is over eight years old," the Larkin court denied the motion. Larkin v. Pullman-Standard Division, Pullman Inc. (Larkin III), No. 75-G-2266-S, slip op.at 1 (N.D.Ala., Apr. 16, 1984), Record, Vol. I, Tab 8, at 1. The court made clear, however, that Larkin I constituted "no opinion as to the rights which these plaintiffs might have as unnamed members of the Swint class." Id. at 2.

Soon thereafter, without opinion, the Swint court denied both of the motions to add the Larkin plaintiffs. See Swint v. Pullman-Standard, No. CV-71-P-0955-S, slip op. (N.D.Ala. Sept.4, 1984). In Swint IX, the court explained the grounds for the denial: the delay in filing the motions was unreasonable, permitting the intervention would prejudice Pullman, and the Larkin, plaintiffs would not suffer any prejudice if not permitted to intervene. See Swint IX, slip op. at 3-4. The court acknowledged, however, that Larkin I did not preclude the Larkin plaintiffs' membership in the Swint class. See id. at 4.

The Larkin plaintiffs timely appealed from the judgment in Larkin III. This court stayed the appeal pending the outcome on remand in Swint. After Swint IX and Swint X were appealed, the court consolidated the Swint and Larkin cases.

III. The Liability Period

The first dispute we must resolve concerns the date from which Pullman's and USW's liability must be measured. With respect to the plaintiffs' Title VII claims, the district court held that only the charge of a named plaintiff could be used to start the liability period running and that the period would begin 90, rather than 180, days before Louis Swint's charge was filed. See Swint IX, slip op. at 6. With respect to the plaintiffs' section 1981 claims, the court held that liability had to be measured from one year prior to the plaintiffs' filing suit, because Alabama's one-year, trespass on the case statute of limitations was the most appropriate to section 1981 claims. See Swint X, slip op. at 3; supra note 19.

We will discuss both of these holdings separately. In certain cases, it

is necessary only to address whichever approach yields the earliest date of potential liability. Unfortunately, we are unable to do so here. On one of the substantive claims - that involving the selection of supervisors - the plaintiffs appear to have proceeded not on a theory of intentional discrimination but on a theory of disparate impact. Because section 1981 requires a showing of intentional discrimination see Stallworth v. Shuler, 777 F.2d 1431, 1433 (11th Cir. 1985), the plaintiffs are potentially entitled to relief on this claim only under Title VII, and will not be able to benefit from the longer liability period we adopt for the section 1981 claims.

A. Dating the Title VII Claims

Title VII requires that an employee

file an EEOC charge within 180 days[23] of an allegedly illegal employment practice if he intends to bring a civil suit based on that practice. See 42 U.S.C. §2000e-5(e)(1982). In addition to operating as a statute of limitations, this requirements has been interpreted to shield a Title VII defendant from damages for any like conduct he may have engaged in prior to 180 days before the filing of a charge.[24]

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[23] On March 24, 1972, Title VII was amended to extend the filing period from 90 days to 180 days. See Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, §4(a), 86 Stat. 103, 105 (1972)(codified at 42 U.S.C. §2000e-5(e)(1982). The retroactivity of this amendment will be discussed in connection with the district court's backdating Swint's charge 90 rather than 180 days.

[24] At first blush, the statement in the text may seem tautologous. It is conceivable, however, that, in the continuing violation context, a plaintiff could file a charge within 180 days of the violation, thereby meeting the statute of limitations, and still attempt to recover damages for harmful effects suffered well before 180 days prior to the EEOC charge. In addition, it is important to distin-

See United Air Lines v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977); Fisher v. Proctor & Gamble Manufacturing Co., 613 F.2d 527, 540 & n.25 (5th Cir. 1980), cert. denied, 449 U.S. 1115, 101 S.Ct, 929, 66 L.Ed.2d 845 (1981). The issue here involves the latter aspect of the 180-day period: selecting the appropriate EEOC charge to establish the date Pull-man's liability commences?

The plaintiffs argue that dating the liability period from the first EEOC charge complaining of like practices, regardless of whether the charge was filed by a named plaintiff, is the correct approach. They also contend that by

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guish the two concepts in class actions, where class members who did not themselves file EEOC charges will be bound, and may be foreclosed from recovery, by the liability period that someone else's charge creates.

dating Pullman's Title VII liability from Louis Swint's October 1969 charge, the district court violated the law of the case. They point to the court's 1974 certification of the class, which included "all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company." Record, Vol. II, Tab 18 at 1 (emphasis added). In the plaintiffs' view, this constituted a holding that liability would be measured from Seal's November 1966 charge. The plaintiffs also cite the court's discussion in Swint III, where the court assumed that liability should be dated from 90 days prior to Commissioner Shulman's March 1967 charge. 15 F.E.P. at 146 n.5. Finally, the plaintiffs direct us to the pretrial order entered prior to the last trial, in 1984. The district

court there instructed the parties to prepare for trial on the assumption that the anterior cutoff date would be 180 days prior to Seals' EEOC charge. Record, Vol. II, Tab 96 at 1; see supra note 25.

The plaintiffs maintain further that despite all these suggestions, if not holdings, that the liability period would be dated from 1966, it was not until 1983 and the rulings against it in Swint VI that Pullman raised any objection to a 1966 cutoff date. Thus, even if Swint's charge should have been the one from which liability was dated, Pullman and USW waived any objection they might have had. To find otherwise, the plaintiffs contend, would be especially inequitable given the decision in Larkin I that the Larkin plaintiffs' claims were precluded because they were adequately covered by the Swint litigation: the Larkin court surely would

not have so decided had it been aware that three years of the plaintiffs' claims were going to be severed from Swint on the fourth trial of the case.

Pullman asserts that the plaintiffs' representation of the district court's decisions is inaccurate and that none of the district court's discussions constituted a holding on the liability period. As a result, the law of the case did not preclude the district court's setting the July 17, 1969 date, and under Kilgo v. Bowman Transportation Inc., 789 F.2d 859 (11th Cir. 1986), and Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982), a Title VII liability period can be dated only from a named plaintiff's charge. Pullman also insists that the standing principles enunciated in General Telephone Co. of the

Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), dictate that a named plaintiff cannot represent class members on claims that accrued before his own.

We hold that the district court erred in dating Pullman's potential liability from 90 days prior to Swint's EEOC charge. The circumstances of this case, when combined with Title VII's role as remedial legislation, convince us that the district court improperly narrowed the Saint litigation after the fourth trial of the case. Pullman's potential Title VII liability should have been dated from September 28, 1966, 180 days prior to Commissioner Shulman's charge alleging that Pullman had discriminated in its hiring and promotional practices.

It is apparent that Pullman waived any objection it might have had to such a

date. The district court discussed the case from the very beginning as if Pullman's potential liability might be dated from 1966. Due to its various dispositions of the case, the district court stopped short of so holding; for that reason, the law of the case does not require us to accept a 1966 date. See Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1169 (5th Cir. Unit A Sept. 1981)("law of the case does not operate to bar subsequent consideration of matters that could have been, but were not raised and resolved in the earlier proceeding"), cert. denied, 455 U.S. 944,102 S.Ct. 1441, 71 L.Ed.2d 656 (1982); see also Robinson v. Parrish, 720 F.2d 1548, 1550 (11th Cir. 1983)(district court need not rigidly adhere to its own rulings in an earlier stage of a case"). Even so, the 180 day filing requirement, "like a statute of

limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127,1132, 71 L.Ed.2d 234 (1982). Insofar as the liability periods simply the inverse of the filing requirement, it too must be subject to waiver and estoppel. By failing before 1983 to raise any objection to the numerous suggestions that 1966 might be set as the anterior cutoff date for its liability, as well as arguing in the Larkin case that the Larkin plaintiffs' claims - which indisputable dated back to 1966 - were being litigated in the Swint case, Pullman waived any objection it might otherwise have had.[25]

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[25] There is a strategic reason why a class action defendant might waive objections to the size or inclusiveness of a class: a favorable decision against an all-inclusive class of plaintiffs will in many instances bar further suits.

In any event, in this case dating liability from 1966 is the most appropriate and logical holding. In considering this issue, it is important to look at the purposes of the 180-day filing requirement, insofar as that requirement dictates the liability period. It is well-established that potential plaintiffs are required to file an EEOC charge within 180 days of an allegedly illegal act or practice so that employers will be given prompt notice of the complaints against them, and the EEOC sufficient time to attempt the conciliation process before a civil action is filed. See Zipes v. Trans World Airlines, Inc., 455 U.S. at 398, 102 S.Ct. at 1135; Kilgo v. Bowman Transportation, Inc., 789 F.2d at 877; Crawford v. United States Steel Corp., 660 F.2d 663, 666 (5th Cir. Unit B Nov. 1981). Neither of these purposes would be defeated by

permitting the charge of the Commission to establish the temporal scope of this action. Spurgeon Seals filed an EEOC charge in November 1966 complaining that the seniority system was being misapplied on account of his race, and less than six months later, an EEOC Commissioner filed a charge launching a broad-based challenge to Pullman's hiring and promotional practices. By the time Louis Swint filed his 1969 charge, Pullman was well aware that its hiring and promotional practices were under scrutiny, and the EEOC had been given ample time to attempt conciliation. To ignore this and restrict Pullman's liability to 180 days prior to Swint's charge would be nothing more than a technical reading of Title VII, which is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Love v. Pullman Co., 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679 (1972).

Indeed, one case from this circuit (cited, oddly, by Pullman) has already held that, in appropriate circumstances, liability may be dated from the EEOC's charge of a person other than one of the named plaintiffs.[26] In Kilgo v. Bowman Transportation, Inc., Edna Kilgo, who had filed an EEOC charge earlier than any other member of the class, died before the class was certified. Her husband was

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[26] The Seventh Circuit and several district courts have so decided as well. See McDonald v. United Airlines, 587 F.2d 357, 361 (7th Cir. 1978)(liability could be dated from charge filed by two class members who were not named plaintiffs where their charges gave the employer sufficient notice that certain practices were challenged), cert. denied, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979); Allen v. Isaac, 99 F.R.D. 45, 50 (N.D.Ill. 1983); Williamson v. Bethlehem Steel Corp., 488 F.Supp. 827, 830-35 (W.D.N.Y. 1980); Petty v. Peoples Gas Light & Coke Co., 86 F.R.D. 336, 342 N.D.Ill. 1979); see also Inda v. United Airlines, 83 F.R.D. 1, 7-8 (N.D.Cal. 1979).

permitted to substitute for her as a class member, but was found an inadequate class representative to serve as a named plaintiff. After concluding that the purposes of the 180-day filing requirement had been met by Kilgo's charge - the employer had notice of the claim and the EEOC was given an opportunity to settle the grievance- this court held that the date of her EEOC filing could be used to determine the temporal scope of the action. See Kilgo, 789 F.2d at877. Not only was this result fair to the employer, in that it turned on his receiving adequate notice, but it advanced judicial economy by ensuring that all the claims of employees discriminated against in similar fashion were heard in a single action.[27] The same can

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[27] To insist that liability be dated only from a named plaintiff's charge would essentially force whomever in a class of employees filed the earliest EEOC charge to do one of three things: act as

be said of our decision to permit the charge of a non-named plaintiff to establish the temporal scope of the action.[28]

Pullman asserts that General Telephone Co. of the Southwest v. Falcon, 457 U.S. at 147, 102 S.Ct. at 2364, 72 L.Ed.2d at 740, prevents using a non-named plaintiff's charge to date liability. In Falcon, the Supreme Court held that a

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the class representative, file a separate action covering the period of time that would not be covered by the class suit, or give up altogether a portion of his claim. Noting that there are many reasons a class member might not wish to be able to act as his class' representative, we reject the opportunity to fashion a per se rule that would have this effect.

[28] We do not, of course, address the situation when a class member files an EEOC charge and receives a right-to-sue letter, and then no suit is filed within the period specified by the letter. The situation here is quite different. The charges filed by the Larkin plaintiffs and Commissioner Shulman were still pending before the Commission when Swint filed suit, so there was no indication that those who filed the earliest charges intended to abandon their causes of action.

person who has not himself suffered a particular type of discrimination does not have Rule 23(a) standing to bring a class action for those who have, simply because he and the class have both suffered forms of racial discrimination. See id. at 158, 102 S.Ct. at 2371. Pullman apparently reasons from this that a class representative also cannot represent class members on portions of their claims for which the representative would not, due to the 180-day filing requirement, have been able to sue; reasoning backward from this proposition, Pullman concludes that liability must be dated from the named plaintiff's charge. The company also argues that it could not have waived any objections to a 1966 date because standing is a jurisdictional and thus non-waivable issue.

We do not agree. First, the Court made clear in Falcon that its decision was

based on the commonality and typicality requirements of Fed.R.Civ.P. 23(a), and there is no reference in the opinion to the constitutional requirement of standing.[29] See id. at 160, 102 S.Ct.at 2372 ("The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the plaintiff's plea that he is a proper class representative under Rule 23(a)."). Because Rule 23's requirements have never

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[29] Indeed, the word "standing" appears only one time in the entire opinion, in a footnote: "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15. We do not read this statement as a reference to constitutional, jurisdictional standing.

been regarded a jurisdictional,[30] Pullman's argument that it cannot have waived any objections to a 1966 date is without merit. See e.g Reynolds v. Sheet Metal Workers, Local 102, 702 F.2d 221, 224 (D.C.Cir. 1981)("[a] claim that the district court erred in its class certification decision does not go to the court's subject matter jurisdiction"); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 912-13 (9th Cir. 1964)(the requirements of Federal Rule 23(a) are not jurisdictional). This seems

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[30] The Supreme Court has recognized that the Congress that enacted Federal Rule 23 was advised that it would neither expand nor constrict subject matter jurisdiction. See Snyder v. Harris, 394 U.S. 332, 341, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969). It follows that the requirements of Rule 23 are not jurisdictional requirements that cannot be waived. See also Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 96 S.Ct. 1251, 1258-60, 47 L.Ed.2d 444 (1976)(class retains standing despite mooting of named plaintiff's Title VII claim).

all the more apparent when one remembers that the liability period derives directly from the 180-day filing requirement, which the Supreme Court has expressly held is in the nature of a statute of limitations and waivable. See Zipes v. Trans World Airlines, Inc., 455 U.S. at 398, 102 S.Ct. at 1135.

Second, even if we were to read Falcon as a case involving a jurisdictional type of standing, it does not necessarily follow from a requirement that a named plaintiff have suffered the same type of injury as those he represents that he is also required to have suffered it (and filed an EEOC charge) at precisely the same time. Cf. Domingo v. New England Fish Co., 727 F.2d 1429, 1442 (9th Cir. 1984)(named plaintiff may represent all class members whose claims were not already time-barred at the time he filed

his charge); Spalitta v. National American Bank of New Orleans, 444 F.2d 291, 294 (5th Cir.)(named plaintiff could represent stockholders on certain fraud claims even if the frauds did not occur while the plaintiff was a stockholder), cert. denied, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 164 (1971). The commonality and typicality requirements of Federal Rule 23(a) are phrased in substantive terms: a party may sue on behalf of a class only if "(2) there are questions of law or fact common to the class, [and] (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(2), (3). A disparity in the forms of discrimination suffered will cause the questions of law and fact and the claims and defenses of the named plaintiff and the class members to be different. In contrast, a disparity

in the dates on which the named plaintiff and other class members filed EEOC charges does not mean that the legal questions or the claims will be different.

Our holdings that Pullman waived any objection to a 1966 date and that a non-named plaintiff's charge may govern do no end our inquiry. We must still determine which of the EEOC charges could give rise to the class claims that were ultimately brought. Unless a charge alleges practices "like or related to" the practices alleged in the complaint, it cannot serve as the basis for a civil action. See Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 928 (11th Cir. 1983); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). The Supreme Court has elaborated on this "like or related to" test: "Any violations that the EEOC ascertains in the course of a reasonable inves-

tigation of the charging party's complaint are actionable." General Telephone Co. v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1706, 64 L.Ed.2d 319 (1980).

Having considered these principles, we conclude that Commissioner Shulman's March 1967 charge is the earliest charge including allegations sufficiently like or related to those in the complaint.[31] The charge alleged that Pullman had discrimi-

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[31] The plaintiffs' brief to this court suggests that Spurgeon Seals' November 1966 charge could be used to date the liability period. On June 6, 1983, the plaintiffs filed a motion expressly asking the district court to date Pullman's liability from Commissioner's Shulman's March 1967 charge. In light of the numerous allegations already in the case that given arguments have been waived or are foreclosed by the law of the case, we find the plaintiffs' failure to acknowledge that they made this argument very irritating. In any event, we are not convinced that Seals' charge was sufficiently like or related to the charges in Swint's complaint. It alleged that the seniority system was discriminatorily misapplied, not that the seniority or assignment systems were in themselves discriminatory.

nated in its hiring and promotional practices. The investigation that followed addressed every practice that would ultimately be challenged in Swint's complaint: initial assignments to departments and jobs, temporary assignments, opportunities for training, promotions, the seniority system, and the selection of supervisors. Pullman thus received more than sufficient notice that several of its plantwide policies and practices were under attack.

Pullman argues that the Commissioner's charge cannot be used as a basis for Swint's suit because certain statutory requirements were not met. The language on which the Company relies is as follows:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any

> period of reference under subsection (d) of this section, whichever is later, the Commission has not filed a civil action under this section, whichever is later, the Commission has not filed a civil action under this section ..., or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

42 U.S.C. §2000e-5(f)(1) (1982) (emphasis added). Directing us to the emphasized language, the company complains that Swint was not named in the charge and that the Commission did not issue Swint a right-to-sue letter in connection with the proceeding involving the Commissioner's charge. We reject this argument for several reasons. First, Pullman presents this challenge for the first time on appeal and

we can perceive no miscarriage of justice that might result from following the general rule that such challenges will not be considered. See Sanders v. United States, 740 F.2d 886, 888 (11th Cir.1984); Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989-90 (11th Cir. 1982). Pullman had adequate opportunity to raise these arguments before the district court, especially after the plaintiffs filed a specific written request that the court date liability from the Commissioner's charge. Second, Pullman's claim that Swint had to be expressly named in the Commissioner's charge to qualify as an "aggrieved" individual under the statute is specious. The statute expresses a clear congressional intent that private suits be permitted to proceed on Commissioner's charges. Pullman's interpreta-

tion conflicts with that intent because it would essentially prohibit suits where a Commissioner acts on behalf of a class so large - such as "black employees of Pullman-Standard's Bessemer, Alabama plant" - that every member cannot be named. Finally, assuming without deciding that the statute required Swint to obtain a separate right-to-sue letter in connection with the Commissioner's charge - he did obtain one in connection with his own EEOC charge - any such defect was cured when the plaintiffs introduced the EEOC decision concerning the Commissioner's charge into evidence. See Pinkard v. Pullman-Standard, 678 F.2d 1211, 1219 (11th Cir. 1982)("the receipt of a right-to-sue letter subsequent to the commencement of a Title VII action, but while the action remains pending, satisfies the precondition that a plaintiff obtain

statutory notice of the right to sue before filing a civil action"), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983). It is well-settled that the requirement that a plaintiff receive a right-to-sue letter is subject to equitable modification. See id. at 1218-19. It is also clear that the purpose of the requirement is to provide the employee with notice that his administrative remedies with the Commission have been exhausted, see Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136, 1140 (5th Cir. 1971), and in turn ensure that the employee has given the EEOC time to take action on the case. The EEOC's written decision finding that there was reasonable cause to believe that Pullman had violated Title VII served this purpose as well as any right-to-sue letter would have.

Pullman's potential liability on the plaintiffs' Title VII claims dates from September 28, 1966, 180 days prior to Commissioner Shulman's charge. At the time the Commissioner's charge was filed the period within which a charge had to be filed - and thus the liability period- was 90 days, see 42 U.S.C. §2000e-5(e) (1970), but an amendment to Title VII in 1972 increased the period to 180 days. The amending legislation stated that it was to apply to anyone whose charges were pending before the Commission when the legislation was passed. See Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, §14, 86 Stat. 103, 113. The amendment was enacted on March 24, 1972, and the Commission's final decision on Commissioner Shulman's charge issued on April 26, 1972. Shulman's charge should

thus be backdated 180, rather than 90, days.

B. Dating the Section 1981 Claims

Although section 1981 provides a federal cause of action, claims under it must be brought within the period set by the most appropriate statute of limitations of the state in which the court sits. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); Whatley v. Department of Education, 673 F.2d 873, 874 (5th Cir.1982). The length of the statute of limitations will in turn establish how far back from the filing of the complaint the liability period will reach. See Bernard v. Gulf Oil Co., 596 F.2d 1249, 1255 (5th Cir. 1979), aff'd on rehearing,, 619 F.2d 459, 463 (5th Cir. 1980), aff'd on other grounds, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). Since the

racial discrimination section 1981 prohibits is "a fundamental injury, to the individual rights of a person," the applicable statute of limitations will be one governing personal injury as opposed to contract, actions. Goodman v. Lukens Steel Co., ___ U.S. ____, ____, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987); see also Wilson v. Garcia, 471 U.S. 261, 275, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985)(section 1983 actions should be treated as if for personal injury). The problem here is that when Swint filed suit, Alabama had two statutes of limitations that applied to personal injury actions. Section 6-2-34(1) provided that "[a]ctions for any trespass to person or liberty" must be brought within six years. Ala.Code §6-2-34(1) (1977). Section 6-2-39(a)(5) provided that"[a]ctions for any injury to the person or rights of another

not arising from contract" must be brought within one year. Id. §6-2-39(a)(5)(repealed 1984).

The plaintiffs argue that the six-year statute, section 6-2-34(1), applies. They cite this court's 1985 decision in Jones v. Preuit & Maudlin, 763 F.2d 1250, 1256 (11th Cir. 1985), that the six-year statute applies to section 1983 claims. They then rely on Goodman v. Lukens Steel, 107 S.Ct. at 2621, for the proposition that the same statute of limitations should be applied to section 1981 actions as is applied to those under section 1983.

Pullman insists that the one-year statute, section 6-2-39(a)(5) applies. The company likens this employment discrimination case to a tort action for interference with contractual relations and cites Alabama cases holding that such actions are governed by section 6-2-39(a)

(5). See, e.g., Teng v. Saha, 477 So.2d 378, 379 (Ala. 1985). Pullman also contends that even if we now deem the six-year statute applicable, presumably on the authority of recent cases, those cases should not be applied retroactively because the company has relied throughout the litigation on the one-year period.

We agree with the plaintiffs that the six-year statute should be applied. Goodman directs us to adopt the same state statute of limitations for both section 1983 and section 1981 actions, and the court has already adopted the six-year statute for section 1983 claims brought in Alabama. See Jones v. Preuit & Maudlin, 763 F.2d at 1256. We also conclude that retroactive application of the six-year statute is appropriate on the facts of this case.

In Goodman, 107 S.Ct. at 2621, the Supreme Court held that the employees section 1981 action was subject to Pennsylvania's two year statute of limitations governing personal injury actions. The employees had argued that the six-year state statute of limitations applicable to interference with contractual relations was the most appropriate. See id. The employees recognized that, under Wilson v. Garcia, 471 U.S. at 268, 105 S.Ct. at 1943, section 1983 actions were to be treated as personal injury actions, but they argued that section 1981 actions should be characterized differently under federal law because the paradigmatic section 1981 claim involved economic, rather than personal, rights. See Goodman, 107 S.Ct. at 2621. The Court disagreed. Justice White writing for the Court, stated:

> Wilson's characterization of §1983 claims is ... equally appropriate here, particularly since §1983 would reach state action that encroaches on the rights protected by §1981. That §1981 has far-reaching economic consequences does not change this conclusion, since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. (emphasis added). We are convinced from this language that the Court intended that the same statute of limitations be applied to all section 1983 and section 1981 actions in a given state. The Court's reference to the overlap between the two civil rights statutes suggests that it would not approve a characterization of section 1983 claims as one type of personal injury and a characterization of section 1981 claims as another type of personal injury.

We are additionally persuaded that this conclusion is correct by the history of Goodman before it reached the Supreme

Court. The Third Circuit had taken the case under en banc consideration, and had concluded not only that the employees' claims were governed by Pennsylvania's general personal injury statute of limitations, but that the federal interests in uniformity and certainty were "best served by applying the same statute of limitations to all of the Reconstruction Civil Rights Cases." Goodman v. Lukens Steel Corp., 777 F.2d 113, 120 (3d Cir. 1985). In affirming, the Supreme Court apparently was not troubled by the latter proposition. Justice White stated flatly" "The Court of Appeals properly rejected [the plaintiffs'] submission." Goodman v. Lukens Steel, 107 S.Ct. at 2621.

Even without the language in Goodman, we would consider this a sound result as a policy matter. In Wilson v. Garcia, the Court recognized that, although section

1988 mandates reference to state law when choosing a statute of limitations in a civil rights action, "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" dictate that the same statute of limitations be applied to all section 1983 actions in a given state. 471 U.S. at 275, 105 S.Ct. at 1947. These same interests are implicated when the choice is whether to apply one statute of limitation to a section 1983 claim and another statute to a section 1981 claim, particularly since both types of claims are often brought together in a single action. See Goodman v. Lukens Steel Corp., 777 F.2d 113, 120 (3d Cir. 1985)("Application of Pennsylvania's six year statute of limitations where the same claim [as it brought under section 1983] is brought under §1981 would lead to a bizarre result."), aff'd, ___ U.S. ____,

107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); accord Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1503 n.2 (11th Cir. 1986)(dictum)("The same single limitations period should apply to §1981 claims [as applies to §1983 claims]."). Applying a single limitations period to section 1981 and section 1983 claims should make it easier for civil rights plaintiffs in Alabama to determine the dates by which they must assert their rights, and will prevent excessive litigation when both a private (section 1981) defendant and a government (section 1983) defendant are involved.

In view of our holding that the same state limitations period applies to both section 1981 and section 1983 claims, and in view of this court's earlier decision that section 1983 claims in Alabama are governed by the state's six-year personal

injury statute, see Jones v. Preuit & Mauldin, 763 F.2d at 1256, Pullman's liability on the plaintiffs' section 1981 claims should be dated from October 19, 1965, six years prior to the filing of Swint's complaint. We recognize that this decision conflicts with earlier circuit decisions in Dumas v. Town of Mount Vernon, 612 F.2d 974, 977 (5th Cir. 1980), Ingram v. Steven Robert Corp., 547 F.2d 1260, 1263 (5th Cir. 1977), and Buckner v. Goodyear Tire & Rubber Co., 339 F.Supp. 1108 (N.D.Ala. 1972), but it seems plain that the Supreme Court's decisions in Wilson and Goodman discussing the nature of section 1983 and section 1981 claims have rendered the analysis of those earlier cases obsolete. When the rationale of our earlier cases is substantially undercut, we are not only free but required to revisit the issue

involved. See Leach v. Pan American World Airways, 842 F.2d 285, 286, 288 (11th Cir. 1988); Gresham Park Community Organization v. Howell, 652 F.2d 1227, 1234-35 (5th Cir. Unit B Aug. 1981).

Pullman insists that, notwithstanding our holding today that the six-year statute applies, our decision should not be applied retroactively. In Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court held that although retroactive application of judicial decisions was the general rule, three factors must be considered in determining whether it is proper in a given case: (1) whether the new limitations period has been occasioned by a change in the substantive law the purpose of which would not be served by retroactivity; (2) whether the decision overruled clear past precedent on which

the complaining party was entitled to rely; and (3) whether retroactive application would be equitable. Id. at 106-07, 92 S.Ct. at 355. Pullman makes no argument with respect to the first factor, and admits, with respect to the second factor, that there was no clear precedent establishing a one-year limitation period in Alabama until Buckner v. Goodyear Tire & Rubber Co., 476 F.2d at 1287, came out in 1973, over a year after the complaint was filed. The company argues, however, that the strength of the third Huson factor dictates that Wilson and Goodman not be applied retroactively. According to Pullman, it would be inequitable to apply the six-year statute given that the company has relied on the one-year statute for so long.

Under the circumstances, this argument is more than slightly ironic, and we

reject it. First, it cannot be said that any aspect of the liability period-either the appropriate section 1981 statute of limitations or the relevant EEOC charge - was every clarified, in those terms. Indeed, if anything regarding the period was made clear, it was that liability would be dated from sometime in 1966,[32] see infra part IIIB, only a few

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[32] Pullman makes a rather remarkable argument that the six-year statute cannot be applied, because the final pretrial order of September 19, 1983 "defined the scope of the action and anterior cut-off date in such a way as to be clearly inconsistent with a six-year statute," and the company prepared for trial on that basis. Brief of Defendant-Appellee Pullman-Standard at 61 (Sept. 8, 1987). Apart from the fact that the pretrial order to which Pullman refers did not address the section 1981, as opposed to the Title VII, statute of limitations, the order specifically instructed the company to prepare for a period dating from May 4, 1966, only six and one-half months short of the six years.

> The court has not decided the issue of which EEOC charge will control. Plaintiffs indicated that a charge was filed against the Company by one

months after the October 19, 1965 date the six-year statute would prescribe.

Second, assuming that the class definition was the district court's indication of the appropriate section 1981 statute of limitations, it must be acknowledged that the definition read "all black persons who are now or have (within one year prior to the filing of any

> Spurgeon Seals, a member of the plaintiff class, on October 30, 1966, and that this charge was still pending on March 24, 1972. This court has not decided whether, absent amendment of the complaint to add Seals as a named plaintiff, his charge is fully transferable to the class. But for the purposes of trial preparation, counsel should assume that the anterior cutoff date is 180 days prior to October 30, 1966.

Record, Vol. II, Tab 96 at 1 (emphasis added). Perhaps this is why Pullman prepared exhibits relating not only to the 1969-1974 period, as its brief to this court suggests, but also to the 1964-1969 period, as the district court's order makes quite clear. See Swint IX, slip op. at 12. In any event, we find that Pullman did not meaningfully rely on any holding that the one-year statute was applicable.

charges under Title VII) been employed by defendant Company." Record, Vol. II, Tab 18 at 1 (emphasis added). The emphasized language reflects the district court's reliance on then-prevailing law holding that an EEOC charge tolled the applicable section 1981 statute of limitations. See Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1378 (5th Cir. 1974)(decided March 27, 1974, two months before the district court's certification of the class); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1017 n.16 (5th Cir. 1971). That principle stood until the Supreme Court overruled it in Johnson v. Railway Express, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975). Thus by arguing that we should apply Alabama's one-year statute of limitations and run it backward from the date of the complaint (rather than any

EEOC charge, as the class certification suggests),[33] Pullman essentially urges us to apply only Johnson, the case in its favor, retroactively.

We decline to do so. Nothing definite was said about the liability period until the district court's 1986 decisions in Swint IX and Swint X, and neither side has demonstrated that it adopted a prejudicial positions in reliance on the law prevailing prior to the Johnson, Wilson, and Goodman decisions. Indeed, when Pullman filed its original

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[33] It might be possible for the one-year statute to be applied but run backward from the Commissioner's EEOC charge, but Pullman appears to find any compromise on this score unacceptable. The discussion in its brief of the liability period is entitled, "The Court Below Correctly Held that All Liability for Periods Before July 17, 1969 Is Barred," and the company makes no mention of the fact that such a finding would require us to apply Johnson v. Railway Express retroactively.

answer, it pled the six-year statute.[34] When the law was clarified in 1973, dictating that the one-year statute should be applied, Pullman did not move for leave to amend its answer, and we find nothing else in the record to support the district court's apparent shift to the one-year statute in the pretrial class certification. Under most circumstances, this failure to replead would constitute a waiver of the shorter statute. See, e.g., Paetz v.United States, 795 F.2d 1533, 1536 (11th Cir. 1986); Johnson-Manville Sales Corp. v. Mitchell Enterprises, Inc., 417 F.2d 129, 131 (5th Cir. 1969). We find it necessary, however, to go that far: suf-

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[34] Pullman's answer read: "This defendant avers that the applicable statutes of limitations, Alabama Code, Title 7, Sections 21 and 22, bar all claims made in the complaint, based on 42 U.S.C.A., Section 1981, arising more than six years prior to the filing of the complaint." Record, Vol. I, Tab 5 at 11 (emphasis added).

fice it to say that Pullman cannot claim for retroactivity purposes that it relied on the one-year statute.

In sum, the most equitable result is to apply retroactively all of the Supreme Court decisions pertaining to the liability period. Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 335, 91 S.Ct. 795, 804, 28 L.Ed.2d 77 (1971)(interests of justice required that if counter defendant's belated limitation defense was to be considered on its merits then counter-claimant's belated tolling argument must be dealt with as well). Alabama's six-year statute of limitations should therefore be applied, and Pullman's potential liability should be dated from October 19, 1965, six years prior to the filing of Swint's complaint.[35]

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[35] As indicated earlier, this ruling will apply only to the plaintiffs' claim of discrimination in initial assign-

IV. Departmental Assignments

Both Pullman and the plaintiffs have appealed certain aspects of the district court's decision that Pullman's departmental assignments of new hires were racially discriminatory. Pullman complains that the departmental assignments of new hires were never in the case as an independent issue, and, relatedly, that Louis Swint has no standing to represent the class on the issue because he was hired prior to the effective date of Title VII. The plaintiffs contend that the district court's finding that all discrimination in assignments ended by February 1969 was in error. We will address these arguments in turn.

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ments, as section 1981 requires proof of intentional discrimination, and the plaintiffs succeeded on their claim concerning the selection of supervisors only on a disparate impact, and thus Title VII, basis.

A. Departmental Assignments as an Independent Issue

Pullman argues that the evidence pertaining to the departmental assignments of new hires came into the case only as circumstantial evidence that the nontransferable seniority system was intended to lock blacks into the departments with consistently lower JC-level jobs. In Pullman's view, this means that the plaintiffs are not entitled to relief on the assignments as a separate claim. We disagree.

The plaintiffs here alleged that they had worked for the company for years without the upward mobility of younger, less senior whites in other departments. They attributed this disparity primarily to the seniority system, reasoning that the departmental-only seniority had the effect of locking blacks into the low-ceiling and often segregated departments

to which they were assigned on a discriminatory basis prior to the enactment of Title VII. When the suit was filed, the Supreme Court had not yet decided Teamsters, and the plaintiffs had to show only that a seniority system perpetuated past discrimination--here, the departmental assignments of new hires--to prove that it was not bona fide. In the course of trying to prove this, it became apparent that the discriminatory departmental assignments did not end with the enactment of Title VII. Pullman would have us ignore this fact because, as the case was first conceived, discriminatory departmental assignments were merely an element of the larger claim that the nontransferable seniority system was discriminatory and were not cast as an independent claim.

For two reasons, we decline to construe the plaintiffs' case so narrowly. First, precisely because the issue of departmental assignments was at all points integral to the plaintiffs' attack on the seniority system, Pullman has had full opportunity throughout the proceeding to defend against the plaintiffs' claim that the assignments were discriminatory. The company does not claim otherwise. Second, a rule requiring plaintiffs to identify precisely what has caused the disparity in their treatment, and to suffer the loss of a claim should they be ignorant of hidden practices or mistaken in their emphasis, would lead us away from the truth, not toward it. In Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985), for example, the plaintiffs levied a general challenge to their employer's promotional practices. The employer responded by attacking the

plaintiff's statistics, asserting that the statistical pool the plaintiffs used included employees that had not yet made it onto a supervisory register. The district court dismissed the case primarily for this reason. Id. at 1521. On appeal, this court reversed, specifically holding that if the procedures used to qualify employees for the supervisory register were themselves discriminatory, those procedures could serve as the basis for relief. See id. at 1525. In discussing the way an employment discrimination action usually unfolds, the court found that it did not matter that the plaintiffs had not initially identified or challenged the procedures for reaching the register:

> [T]he purpose of Title VII is the removal of artificial, arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race or other impermissible classifications.... "This purpose is not well-served by a requirement that the plaintiff in

> every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified."

Id. at 1528 (quoting Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985)). This case is analogous, in that the plaintiffs challenged the promotional system generally, and eventually it appeared that the disparity could have resulted as much from post-Title VII discrimination in assignments as from such discrimination prior to Title VII.

B. Swint's Representation of the Class on the Issue of Discriminatory Assignments

Pullman makes a related claim that Louis Swint and Willie Johnson are without standing to represent the class on the issue of departmental assignments of new hires because they were hired -- and assigned to the Steel Erection Department

-- prior to July 2, 1965, the effective date of Title VII.[36] As in its argument concerning the dating of the liability period, Pullman relies on General Telephone Co. of the Southwest v. Falcon, 457 U.S.at 147, 102 S.Ct. at 2364, 72 L.Ed.2d at 740, which requires that a named plaintiff have actually suffered a specific discriminatory practice if he is to represent the class in challenging that practice. The company defends its failure to challenge the named plaintiffs' standin earlier on the ground that Falcon constituted new law.

Pullman's argument that it had no basis on which to raise a standing claim earlier in the proceeding is persuasive. Falcon was new law; in fact, the decision reversed a ruling from this circuit. See

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[36] According to Pullman, Swint was hired on November 24, 1964, and Johnson was hired on January 12, 1956.

General Telephone Co. of the Southwest v. Falcon, 626 F.2d 369, 375 (5th Cir. 1980). Until Falcon was handed down, this circuit required only that a named plaintiff have suffered some form of discrimination on the same general basis--race, sex, religion--as the members of his class. See, e.g., Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

We are not persuaded, however, by Pullman's argument on the merits of its objection. As we noted earlier, Falcon was concerned with whether the commonality and typicality requirements of Fed.R. Civ.P. 23, governing class actions, were met. The case involved a named plaintiff complaining that he had been passed over

for promotion and yet attempting to represent other Mexican-Americans who had not been hired. The Court found that Rule 23 standing could not be based solely on the fact that the named plaintiff and the class members had both suffered discrimination based on their national origin. See Falcon, 457 U.S. at 158, 102 S.Ct. at 2371.

The Court acknowledged, however, that provided he is attacking the same discriminatory practice, a named plaintiff may have standing even though he is challenging its effects on an aspect of his employment different from that of some of the class members: an employee denied promotions because of a discriminatory test may represent persons who were not hired because of the same test. See id. at 159 n. 15, 102 S.Ct. at 2371 n. 15. The Court also stated that "[s]ignificant

proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion." Id. This court has since recognized these "exceptions to the general rule" and emphasized that they are exceptions precisely because they are circumstances in which the commonality and typicality requirements of Rule 23 are satisfied. Griffin v. Dugger, 823 F.2d 1476, 1487 (11th Cir. 1987).

We believe that the commonality and typicality requirements of Rule 23 are satisfied by Swint's and Johnson's representation of the class on the issue of discriminatory assignments of new hires even though, because of the date they were hired, they personally may not recover on

the assignments as an independent claim. See East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 1898 n. 12, 52 L.Ed.2d 453 (1977) (where class claims have already been tried and initial certification was proper, class members' claims "[do] not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims"). As we noted earlier, see supra part III.A, Rule 23 requires that there by "questions of law or fact common to the class, [and that] the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2), (3). From the start, the plaintiffs' basic complaint has been that Pullman prevented black employees from moving into its higher-level positions through a

combination of discriminatory initial assignments and a departmental-only seniority system. At the time of certification, this claim was legally identical to that of every other member of the class.

The fact that the plaintiffs' claim was ultimately broken up into two components--the assignments of new hires and the seniority system itself--because the Teamsters decision changed the law to require that a seniority system be analyzed separately and invalidated only if maintained with discriminatory intent, does not retroactively dictate that the district court abused its discretion in initially determining that the named plaintiffs' claim was typical of and involved questions of law and fact common to the class members' claims. Cf. Cox v. American Cast Iron Pipe Co., 784 F.2d

1546, 1557 (11th Cir.) ("To determine [in evaluating commonality] what legal claims plaintiffs allege, a judge must look not to defendant's interrogatories but to plaintiffs' complaint."), cert. denied, ___ U.S. ____, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). Nor did this fact require the district court to decertify the class on Pullman's motion. See Cox v. American Cast Iron Pipe Co., 784 F.2d at 1557 ("Rule 23 does not require that all the questions of law and fact raised by the dispute be common"); Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985) ("The similarity of the legal theories shared by the plaintiffs and the class at large is so strong as to override whatever factual differences might exist"). The same injury--being locked into Pullman's lower-paying jobs--was under attack by both the named plaintiffs and the class members,

and the only real question was whether it was the discrimination in assignments or the nature of the seniority system, or both, that prevented blacks from moving up the job ladder. The identity of the named plaintiffs' and class members' injuries, especially in light of the way the practices challenged were interrelated, was enough to satisfy the second Falcon exception. It indicated that there was a "general policy of discrimination ... [that] manifested itself in hiring and promotion practices in the same general fashion." Falcon, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15 (emphasis added).

C. The Date on Which Discriminatory Assignments Ceased

The plaintiffs argue that the district court erred in determining that Pullman no longer discriminated in assigning new hires after February 1969. The plaintiffs complain about what they

deem the district court's vacillation on the issue: in Swint I, the court found that blacks had been kept out of some departments and relegated to others until as late as 1972; in Swint III, the court found that all discrimination in assignments ended by December 1966; and in Swint IX, the court found that the discrimination in assignments ended by February 1969. In the plaintiffs' view, it is not possible to find that certain departments included no blacks or no whites through 1971 and nonetheless conclude that discrimination ended in 1969. The plaintiffs also complain that Pullman's expert, on whom the district expressly relied in Swint IX, used a cumulative figure for the 1969-1974 period and consequently admitted that he could not pinpoint the date on which discrimination in assignments ended. Finally, the

plaintiffs contend that the district court relied too heavily on the 1969 OFCC agreement and conspicuously changed its opinion of the agreement between its decisions in Swint I and Swint IX.

We do not find the plaintiffs' arguments sufficient to disturb the district court's finding of fact with respect to the date on which Pullman stopped discriminating in assignments. The plaintiffs' contention that the district court's Swint I decision that discrimination continued until 1972 should be regarded as the law of the case is incorrect. As this court pointed out in Robinson v. Parrish, 720 F.2d at 1548, a district court need not rigidly adhere to its own rulings in an earlier stage of the case. Id. at 1550. To require that the district courts do so "would actually thwart the purpose of the [law of the

case] doctrine" because it would prevent them from correcting errors that would otherwise warrant reversal on appeal and necessitate an entirely new trial. Id.

Although finding it of considerable force, we must also reject the plaintiffs' argument that the district court was substantively in error. In Swint VII, the Supreme Court made quite clear that the issue of discriminatory intent is a pure question of fact, subject, under Fed.R.Civ.P. 52(a), to review only for clear error. Swint VII, 456 U.S. at 287-88, 102 S.Ct. at 1789. Although a district court's finding of discrimination may be set aside if it rests on "an erroneous view of the law," id. at 287, 102 S.Ct. at 1789, it may not be set aside simply because the appellate court would decide the case differently on the same set of facts. Id. at 292, 102 S.Ct. at

1792. Because there was some evidence to support the district court's conclusion on the date discrimination in assignments ceased, and nothing in the opinion reflects an erroneous view of the law, the February 1969 date must stand.

It is true that five of Pullman's twenty-eight departments remained all white or all black after February 1969.[37] Were this the only evidence, the inference of discrimination would be very strong. We do not believe, however, that these numbers per se required the district court to find intentional discrimination. There was expert testimony that there was a significant difference between the

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[37] USW's Air Brake and Inspection Departments remained all white until approximately 1971 and IAM's Die & Tool and Maintenance Departments remained all white until 1970. See Swint I, 11 F.E.P. at 953; Swint VI, 624 F.2d at 529. Conversely, no whites were assigned to USW's Die & Tool Department until 1971. Swint I, 11 F.E.P. at 953.

assignment patterns of the 1964-1969 and 1969-1974 periods, and although segregated departments were not completely eliminated by February 1969, four of the original nine segregated departments were integrated between 1965 and 1969. There was also evidence pertaining to the changes instituted by the January 1969 OFCC agreement: Pullman hired a black equal employment officer and began to encourage black employees to take advantage of company-financed vocational training. The district court was entitled to evaluate all of this evidence and assign certain items more weight than others.

In this connection, it makes no difference that Pullman's expert used cumulative data and admitted that he could not determine from the data the date on which assignments were no longer

discriminatory. Unless flaws in statistical evidence are so egregious as to completely deprive the evidence of relevance, they go to the evidence's probative value, not to its admissibility. Bazemore v. Friday, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986). The cumulative nature of the evidence here may have rendered it of less value, but it cannot be said to have deprived it of all value. The evidence still served to show the direction in which assignments at the Bessemer plant were moving, and it could not have misled the district court precisely because of the very admission about which the plaintiffs complain: Pullman's expert was candid enough to admit that a particular ending date could not be pinpointed. Finally, the plaintiffs overstate the district court's reliance on the data. The court's opinion

merely recites the conclusions of Pullman's expert, as well as the results of the court's own statistical model, and there is nothing to indicate that the court drew more than a generalized inference concerning the date from Pullman's data.[38]

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38 The court wrote:

> The statistical evidence was generally divided into two time periods--1964 to 1969 and 1969 to 1974. As might be expected, the defendants' and plaintiffs' experts took different statistical approaches and arrived at somewhat conflicting conclusions. The court carefully studied the evidence presented by the parties and at trial presented to the parties for their comment another standard statistical model. Plaintiffs' expert acknowledged that a considerable change had taken place in the job class distribution by 1969. Defendants' expert found a statistical difference between the pre-1969 and post-1969 periods, with a rough parity between the races in terms of job class assignments from 1969

Indeed, it seems rather clear to us--from its choice of February 1969--that the district court was most impressed with the January 1969 OFCC agreement and the testimony with regard to the changes the agreement wrought. We might not have been equally impressed, but we cannot say that the court was clearly erroneous for relying on the agreement. The plaintiffs' emphasis on the court's change in terminology respecting the agreement--stating in Swint I that the agreement "never became effective," 11 F.E.P. at 953 n. 32, and in Swint IX that it "was never termed official," slip op. at 13 n. 35--is misplaced. Even assuming that there is a meaningful difference between the two phrases, which we very much doubt, both

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forward. The alternative study prepared by the court indicated that post-1969 assignments were not racially tainted.

descriptions are based on the idea that the union did not accept the agree-ment, and in measuring Pullman's intent, the union's position is essentially irrelevant. The court could have concluded, based on the evidence, that the agreement and the programs put in place after its adoption by the company signalled Pullman's intent to change its discriminatory ways.

As should be clear, we affirm the district court's holdings with respect to Pullman's liability for discriminatory departmental assignments. Louis Swint has Rule 23 standing to continue his represen-tation of the class on the issue, and Pullman is liable for classwide discrimi-nation in assignments dating from October 19, 1965 through January 31, 1969.

V. The Nontransferable Seniority System

The plaintiffs appeal from the district court's decision that the nontransferable seniority system under which Pullman and USW operated in awarding promotions was a bona fide seniority system protected by section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982). They argue that the district court erred in three respects: (1) in refusing to consider whether IAM's arguably racist motives and membership practices so tainted the system that Pullman cannot claim it was bona fide, even if USW can, (2) in failing to consider evidence that in 1965, after it appeared that all jobs at the plant would have to be opened to persons of all races, Pullman abandoned its earlier practice of offering on-the-job training in welding,[39] and (3) in

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[39] A Pullman official admitted that the practice changed because white welders at the Bessemer plant were unwilling to

excluding the testimony of over twenty black employees that Pullman discriminated in its job assignments within departments. Although again, we might have weighed the evidence differently, we are unable to find that the district court's validation of the seniority system was clearly erroneous.[40]

In evaluating the seniority system, our primary guide is International Brotherhood of Teamsters v. United States, 431 U.S. at 324, 97 S.Ct. at 1843, 52 L.Ed.2d at 396. In Teamsters, the Supreme Court held that, in light of section 703

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train black employees.

[40] In Pettway v. American Cast Iron Pipe Co., 476 F.2d 1157, 1191 n. 37 (5th Cir. 1978), cert. denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979), this court held that the immunity created by section 703(h) extends not only to Title VII claims but to section 1981 claims as well. For that reason, the analysis that follows will not focus on the statute on which the plaintiffs base their challenge.

(h),[41] a seniority system of promotions cannot be invalidated solely on the basis that it perpetuates pre-Title VII discrimination. See id. at 353-54, 97 S.Ct. at 1864. The Teamsters Court also indicated that a seniority system cannot be invalidated solely because it perpetuates post-Title VII discrimination. Relying on the Court's concurrent decision in United Air Lines v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977, Justice Stewart wrote:

> The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case, in light of the

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41 Section 703(h) provides, in relevant part, that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1982).

> injunction entered against the union.... Our decision today in United Air Lines v. Evans, ... is largely dispositive of this issue. Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time-barred. But this is simply an additional reason not to hold the seniority system unlawful,[42] since such a holding would in no way enlarge the relief to be awarded.

431 U.S. at 348 n. 30, 97 S.Ct. at 1861 n. 30 (footnote added) (emphasis added) (citations omitted).

As this passage demonstrates, the Court has drawn a definite distinction

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42 Because Evans dealt only with a situation where the employer's separate discriminatory acts in manipulation of the seniority system had not been the subject of a timely EEOC charge, we might not have read the opinion as covering situations where separate discriminatory acts are independently and properly in a case. The Teamsters passage, however, appears to equate the two situations.

between challenges to a seniority system and challenges to other discriminatory conduct that in turn manipulates the system to the detriment of black employees. See also Franks v. Bowman Transportation Co., 424 U.S. 747, 758, 96 S.Ct. 1251, 1257, 47 L.Ed.2d 444 (1975) ("The underlying legal wrong affecting [the class] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system."). For a plaintiff to prevail in a challenge to a seniority system, there must be a finding that the system itself was negotiated or maintained with an actual intent to discriminate.[43]

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[43] Evidence that the seniority system has been manipulated can certainly be considered in evaluating an employer's intent with respect to the creation or maintenance of a seniority system, Evans, 431 U.S. at 558, 97 S.Ct. at 1889, but a system cannot be invalidated on such evidence standing alone. Id. at 560, 97 S.Ct. at 1890.

See Teamsters, 431 U.S. at 356, 97 S.Ct. at 1865; see also Swint VII, 456 U.S. at 289, 102 S.Ct. at 1790. Just as in an ordinary disparate treatment case, the burden of persuading the district court that a system is the product of an employer's discriminatory intent lies with the plaintiff. Cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. at 82, 97 S.Ct. at 2276 ("[section] 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing a discriminatory purpose"); Harris v. Plastics Manufacturing Co., 617 F.2d 438, 440 (5th Cir. 1980) ("There was no testimony indicating that the seniority system was instituted or maintained for racially discriminatory reasons."); Fisher v. Proctor & Gamble Manufacturing Co., 613 F.2d at 542 ("there is no evidence in the record to show that the seniority system

had 'its genesis in racial discrimination' or that it was negotiated and maintained for any 'illegal purpose'"). Insofar as the decision on the bona fides of a system turns on whether it was negotiated or maintained with discriminatory intent, it is a question of fact subject to review by this court only for clear error. Swint VII, 456 U.S. at 289-90, 102 S.Ct. at 1790-91.

The district court's treatment of Pullman's relationship with IAM was not clear error. The plaintiffs appear to be arguing a syllogism of sorts: (1) no one can seriously question that IAM supported the concepts of departments in general and nontransferable seniority in order to keep its local all white; (2) Pullman entered into a collective bargaining agreement incorporating IAM's nontransferable seniority provisions; therefore, (3)

Pullman adopted IAM's discriminatory motive. The problem with this argument is that the conclusion does not necessarily follow from the minor premise. Without independent evidence of Pullman's intent with respect to the seniority system, the plaintiffs are essentially urging us to impute IAM's motive to Pullman. In Swint VII, however, the Supreme Court expressly prohibited us from doing so:

> IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of USW.

456 U.S. at 292, 102 S.Ct. at 1792.

By recognizing that the plaintiffs' argument is in essence one of presumption,

we are not ignoring the plaintiffs' insistence that there was some independent evidence confirming Pullman's discriminatory intent. As noted above, the plaintiffs do cite evidence that Pullman did not assign any blacks to the IAM departments until 1970 and discontinued its practice of on-the-job training once the courts began requiring that all jobs at the plant be made available to black employees. Still, none of this evidence goes directly to Pullman's intent regarding the system. It tends to prove instead that Pullman engaged in a number of other, separate discriminatory practices, and, as noted above, the Supreme Court has required us to keep such distinctions in mind.

In short, we cannot say that the district court attributed insufficient significance to the plaintiffs'

circumstantial evidence in the face of considerable direct evidence that the system was not the product of discriminatory intent. The district court carefully analyzed the evidence presented, paying special attention to the four factors this court emphasized in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978): whether the system operates in a neutral fashion, discouraging all employees equally from transferring between departments; whether the system of seniority units is rational and in accord with industry practice; whether the system had its genesis in racial discrimination; and whether the system was negotiated and maintained free from any illegal purpose. The evidence revealed that whites as well as blacks often desired to transfer but

were disinclined to do so because they too would lose their seniority. The evidence also showed that systems including nontransferable seniority between given units are quite common not only with manufacturers generally but with manufacturers of railroad cars.[44]

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[44] The plaintiffs argue that the law of the case doctrine prevented the district court from deciding that the nontransferable seniority system was rational. They cite this court's holding in Swint VI, 624 F.2d at 531, that there was no explanation for the segregated departments other than racial discrimination. They then point out that the union asked the Supreme Court on review of Swint VI to hold expressly that the departmental seniority system was rational, but the Court declined to do so. This sequence of events, the plaintiffs argue, left in place Swint VI's holding that the system was irrational.

The plaintiffs' argument is without merit. The Swint VI holding with respect to the rationality of the system was one of the two with which the Supreme Court most found fault. In discussing how this court had not properly applied Rule 52(a), Justice White wrote:

> In particular, in regard to the second James factor--whether the

Finally, although there was considerable evidence that the system was adopted at a time when Pullman was openly discriminatory in other respects--i.e., the system did have its "genesis" in racial discrimination--there was nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority.

> departmental structure was rational or in line with industry practice--the Court of Appeals did not focus on the evidentiary basis for any particular finding of the District Court. It appeared to make an independent examination of the record and arrive at its own conclusion contrary to that of the District Court.

Swint VII, 456 U.S. at 291 n. 21, 102 S.Ct. at 1791 n. 21. This indicates rather clearly that the Swint VI holding with respect to the system's rationality did not survive Swint VII, and it makes no difference that the Court rejected the union's request to hold the system rational. Indeed, that it is not an appellate court's role to enter fact-findings one way or the other was the Supreme Court's whole point.

Indeed, there was evidence that Pullman would have preferred no seniority or the narrowest seniority possible so that it could have the greatest flexibility in filling vacant positions. There was also evidence that at a meeting of primarily black USW employees, a proposal to merge certain departments was voted down. Under these circumstances, the district court was entitled to accept Pullman's theory that the nontransferable seniority system was a compromise negotiated and maintained without discriminatory intent.[45] Having thus found that three of the four James

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[45] We do not even touch upon much of the evidence USW cites with respect to the negotiation of the seniority system, such as the fact that blacks were represented on the negotiating committee and USW's history as a protector of civil rights, because the plaintiffs have recognized that the district court's finding with respect to USW's intent cannot be found clearly erroneous. See Brief for Plaintiffs-Appellants William B. Larkin, Louis Swint, et al. at 57.

factors went against a finding of discriminatory intent, the court was not clearly erroneous in concluding that the seniority system was bona fide.

The fact that the district court excluded the plaintiffs' evidence with respect to Pullman's allegedly discriminatory job assignments within departments does not change our conclusion. We agree with the plaintiffs that the proffered testimony would have served as circumstantial evidence that the system was maintained with discriminatory intent, but we cannot accept the plaintiffs' failure to introduce the evidence before the 1984 proceedings. The plaintiffs knew, as of 1977 and the Teamsters decision, that they would have to prove that the seniority system was intentionally discriminatory, and a post-Teamsters trial was held in early 1978

precisely for that purpose. It cannot be said that the plaintiffs simply discovered late in the proceedings that many of their number had been subjected to intradepartmental discrimination: Spurgeon Seals' November 1966 EEOC charge specifically complained that he had been passed over within his department in spite of his seniority. Additionally, the case was returned to the district court under a limited remand. The district court was instructed "to determine what impact the 'locking-in' of blacks to the least remunerative departments had on discouraging transfer between seniority units, and the significance of the discriminatory motivation of IAM with respect to the institution of USW's seniority system," and to hold any other proceedings that "may be deemed necessary in view of our prior opinion and that of

the United States Supreme Court." Swint VIII, 692 F.2d at 1031-32. Had it permitted the plaintiffs to embark on a new line of proof, the district court might well have violated the mandate rule. See International Brotherhood of Boilermakers v. Barber, 841 F.2d 1067, 1071 (11th Cir. 1988). For these reasons, the district court did not abuse its discretion in excluding the testimony of the plaintiffs complaining of intradepartmental discrimination.[46]

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[46] Nor did the district court err, as the plaintiffs urge in their brief, in failing to provide a remedy for Pullman's allegedly discriminatory intradepartmental assignments. The intradepartmental assignments were not a natural sub-issue of the plaintiffs' challenge to the seniority system, as were the initial departmental assignments we have recognized as a viable independent claim. See supra part IVA. And we find no indication whatsoever in the record that the plaintiffs ever made clear that they were asserting intradepartmental assignments as an independent claim. For example, in their 1978 brief to this court, the plaintiffs voiced no complaint

In concluding our discussion of the seniority system, one thing should be made clear. By affirming the district court's ruling, and finding it conceivable that there could have been discrimination in initial assignments but not in maintaining the seniority system, we are not denying that the two issues are interrelated. Indeed, it is readily apparent that the departmental discriminatory assignments may have caused the seniority system to have a discriminatory impact on black employees' ability to move up the job ladder. As a result, during the Phase II proceedings, any member of the plaintiff class who suffered actionable

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that the district court overlooked their claim that intradepartmental assignments were discriminatory. In the face of this complete dearth of argument and evidence, the plaintiffs' claim that the references in pretrial orders and the like to "job" assignments prove that they were arguing this all along is simply not persuasive.

discrimination in his initial assignment shall be entitled to a consideration of those jobs within the plant he might have gotten had he not been relegated to an all-black department or, in any event, kept out of the all-white departments. Once this determination has been made, corresponding "make-whole" relief should be awarded.

VI. The Selection of Supervisors

Pullman appeals from the district court's ruling that our holding in Swint VI that the company had discriminated in its selection of supervisors is the law of the case. Pullman's overall objection consists of several interrelated arguments. First, in the company's view, the Swint VI holding does not constitute the required finding of intentional discrimination. Second, the holding must be reconsidered because a number of later

cases have changed the applicable law: (1) United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), makes clear that Swint VI's references to the plaintiffs' "prima facie case" and the defendant's "rebuttal" were inappropriate; (2) Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), indicates that the plaintiffs' case was erroneously based on statistics that did not account for the qualifica-tions required of Pullman supervisors; and (3) Swint VII, although dealing exclusively with the seniority system, reflects the Supreme Court's view that Swint VI, as a whole, was an improper exercise of appellate fact-finding. Third, the Swint VI holding cannot be the law of the case because this court relied in part on its

concurrent holding that the seniority system at Pullman was not bona fide but intentionally discriminatory, a holding the Supreme Court overturned. We reject these arguments and affirm the district court's ruling.

We must acknowledge from the outset that if they were substantively correct, Pullman's arguments might warrant a holding that the decision in Swint VI does not constitute the law of the case. Although the law of the case doctrine does dictate that a district court is bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case, Robinson, 690 F.2d at 872, the doctrine does not apply to issues that were not actually decided, either explicitly or implicitly. Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984) ("the doctrine

encompasses only those issues previously determined"); Signal Oil & Gas Co., 654 F.2d at 1169 ("law of the case does not operate to bar subsequent consideration of matters that could have been, but were not, raised and resolved in the earlier proceeding"). Pullman's first argument, that the Swint VI treatment of the supervisors issue was not the requisite finding of intentional discrimination, is in essence a contention that Swint VI did not actually decide the supervisors issue. Likewise, Pullman's second argument, that Supreme Court cases decided after Swint VI require that the decision be reconsidered, appears to invoke a well-established exception to the law of the case doctrine. The doctrine does not bar reconsideration of a legal conclusion when controlling authority has since made a contrary decision of applicable law. Wheeler, 746

F.2d at 1440; EEOC v. International Longshoremen's Ass'n., 623 F.2d 1054, 1058 (5th Cir. 1980), cert. denied, 451 U.S. 917, 101 S.Ct. 1997, 68 L.Ed.2d 310(1981). Finally, Pullman's third argument, that Swint VI must be reconsidered because an aspect of the case on which this court relied was overturned by the Supreme Court, implicates yet another exception to the doctrine. A prior appellate decision may be disregarded if it was clearly erroneous and would work a manifest injustice. Wheeler, 746 F.2d at 1440; United States v. McClain, 593 F.2d 658, 664 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979). We are unable to conclude, however, that Pullman's arguments are meritorious in substance.

It is true, for example, that Swint VI does not include a finding that Pullman

intentionally discriminated in its selection of supervisors. That observation, however, is irrelevant: the plaintiffs here clearly proceeded on a disparate impact, rather than disparate treatment, theory and thus did not need to prove discriminatory intent. See Connecticut v. Teal, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 430-32, 92 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1971); see also Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15 (discussing the distinction between disparate treatment and disparate impact cases). They were required, as an initial matter, to show only that a facially neutral practice was operating to exclude blacks from the supervisory positions in a significantly disproportionate fashion. See Teal, 457 U.S. at 446, 102 S.Ct. at 2530; Dothard v.

Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977). The burden--not just of production but of persuasion--was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity. See id. at 329, 97 S.Ct. at 2727; Griggs, 401 U.S. at 432, 91 S.Ct. at 854. The Swint VI court found simply that while the plaintiffs had met their burden, Pullman had offered no legally acceptable evidence that is subjective selection procedure was a business necessity. The district court's decision that Pullman was liable was properly based on this conclusion of law.

Pullman similarly confuses disparate treatment and disparate impact cases by arguing that United Postal Service v. Aikens requires a reconsideration of the Swint VI holding. Aikens did hold, as

Pullman notes, that once a case is fully tried, the concepts of plaintiffs' "prima facie case" and "rebuttal" should be discarded and the case evaluated to determine solely whether plaintiffs proved intentional discrimination, 460 U.S. at 711, 715, 103 S.Ct. at 1482, and, as noted above, the Swint VI court did use the prima facie case and rebuttal terminology. Aikens, however, was a disparate treatment case requiring a showing of discriminatory intent, and its result was inextricably related to the Court's earlier attempts to make discriminatory intent susceptible of proof. The prima facie case-rebuttal-pretext framework for disparate treatment cases was developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), precisely because the Court realized that it would seldom be possible for plaintiffs to prove

intentional discrimination directly and wanted to establish a series of shifting presumptions to ease that otherwise impossible burden. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 8, 101 S.Ct. 1089, 1094 n. 8, 67 L.Ed.2d 207 (1981); see also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). Aikens is thus wholly inapplicable to this disparate impact case,[47] where proof of discriminatory

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[47] Apparently anticipating that the plaintiffs, and perhaps this court, would distinguish Aikens as a disparate treatment case, Pullman argues that Bazemore v. Friday, 478 U.S. at 978, 106 S.Ct. at 3000, indicates that Aikens' holding is not limited to disparate treatment cases. Bazemore, however, was a "pattern and practice" case requiring the plaintiffs to "'establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure--the regular rather the unusual practice.'" Id. at 3008 (quoting Teamsters, 431 U.S. at 336, 97 S.Ct. at 1855). Because this burden is so similar to that imposed on the plaintiffs-

intent has never been necessary, and does not require that Swint VI be overturned simply because the opinion employed "prima facie case" and "rebuttal" terminology. Indeed, when one considers that a disparate-impact defendant actually carries a responsive burden of persuasion, unlike the rebuttal burden of production borne by the disparate-treatment defendant, it seems clear that the Swint VI court's references were, in a sense, misnomers intended to represent the parties' respective burdens.

-and only on the plaintiffs--in disparate treatment case, we do not believe Bazemore sufficiently akin to a disparate impact case to warrant any further extension of Aikens. We are especially comfortable with this conclusion having noted now-Chief Justice Rehnquist's opening footnote in Aikens: "We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants." 460 U.S. at 713 n. 1, 103 S.Ct. at 1481 n. 1.

We must also reject Pullman's argument that Johnson v. Transportation Agency reflects a change in the applicable law requiring us to reconsider and presumably overturn Swint VI. Johnson addressed the proof necessary to establish that a "manifest imbalance" in an employer's previous hiring or promotional policies justified its giving preference to women or minorities. In the course of its discussion, the Court noted that any statistics offered to prove such an imbalance must compare those actually hired or promoted with "those in the labor force who possess the relevant qualifications." 480 U.S. at _____, 107 S.Ct. at 1452. The Court also indicated that a plaintiff attempting to make out a prima facie case under Title VII is subject to the same requirement: "In order to make out a prima facie case on [a Title VII]

claim, a plaintiff would be required to compare the percentage of black skilled workers in the ... work force with the percentage of black skilled craft workers in the area labor market." Johnson, 480 U.S. at ____ n. 10, 107 S.Ct. at 1452 n. 10 (employing the facts from United Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in a hypothetical). Pullman argues from this observation that the plaintiffs here failed to show that there were any qualified blacks denied supervisory positions.

In our view, Pullman overstates the holding of Johnson. Johnson, and Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), upon which the Johnson Court relied, represent the Court's efforts to ensure that a Title VII

plaintiff's statistical evidence is sufficiently narrow to raise a legitimate inference of discrimination. In other words, the cases set forth a relevance threshold that plaintiffs must satisfy if their case is to proceed further. Here, the plaintiffs compared the percentage of blacks in the Pullman workforce, all of whom were theoretically eligible for positions at least as temporary supervisors, with the percentage of blacks who were actually selected. There was no application process for the supervisory positions, so it was not possible for the plaintiffs to compare the percentage actually selected with the percentage of applicants. Additionally, even when, in the early stages of the proceeding, Pullman was under what it would now deem the mistaken impression that it was the party responsible for identifying the

qualifications necessary to become a supervisor, it put forth only generalized criteria [48]--ability to get along with

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[48] In its Swint III ruling that Pullman had not discriminated in the selection of supervisors, its last discussion of this issue, the district court did not specify a single "skill" that was needed to perform as a supervisor, despite its conclusion that "[i]t is clear from the evidence, if not from common sense, that special skills are needed by supervisors." 15 F.E.P. at 150. The court did fault the plaintiffs' statistics for failing to account for the higher rate of black illiteracy and for the time blacks would need, due to previous discrimination, to develop "skills useful to supervisors," id. at 150 n. 15, whatever those were. Both of these observations, however, were in direct contravention of this court's holding in Swint II:

> Since no minimum educational requirement was proven legal under this strict guidelines of Title VII, the 'requirement' may not be used as a generalized inference to explain why blacks were not potential supervisors.
>
> ....
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> ... The [district court in Swint I] concluded that due to pre-'65 segregation of jobs, it has taken blacks some time to learn the range of job skills necessary to perform

other employees, knowledge of particular departments, and experience as a temporary foreman--that either would be impossible to incorporate into statistical proof or were themselves the result of discrimination.

Put simply, the plaintiffs used the narrowest statistics available, and we will not fault them for failing to account for "qualifications" that Pullman has, to this day, been unable to definitively articulate. To hold otherwise would be to read Johnson and Hazelwood as requiring plaintiffs to identify at the outset every criterion employed in a subjective selection process, a virtually impossible feat and one this court rejected in Griffin v.

> supervisory duties. This justification for not promoting blacks has been uniformly rejected by this court.

539 F.2d at 104.

Carlin, 755 F.2d at 1528.[49] We do not believe that the Supreme Court intended such a radical result even in disparate treatment cases, much less in disparate impact cases. We are convinced that if the Court had intended to reassign the burden of production to Title VII plaintiffs, it would have said so. Pullman's final two contentions are based on the Supreme Court's holding in Swint VII. The company first argues that even if the Court did not directly review the Swint VI

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[49] We must emphasize that our holding is one of degree. We recognize fully that Johnson and Hazelwood require plaintiffs to recognize the basic qualifications for a position and exclude from their statistical pools persons who are obviously unqualified. We simply do not believe that plaintiffs are responsible for reading their employers' minds and culling out those persons who do not meet narrow, employer-specific "qualifications." Indeed, it is often those very qualifications that are causing a discriminatory impact; they should be subjected to the light of day and evaluated to see if they are truly necessary to the employer's business.

holding on the selection of supervisors, its opinion makes clear that all of Swint VI should be disregarded as improper fact-finding. For two reasons, we find this contention insufficient to require that the supervisors issue be reopened.

First, we are not free to reexamine an issue that has been finally decided and as to which certiorari has been denied unless there has been a clear change in the applicable law or our prior decision is found "manifestly erroneous." The holding in Swint VII presents neither of these situations. Swint VII did not change the law; it held simply that this court had not properly applied the clear error standard of Rule 52(a) to the seniority system issue. There was no suggestion in Swint VII that this court's treatment of the supervisors issue suffered from the same infirmity.

Second, even if it were appropriate to take a second look at Swint VI's treatment of the issue, we would hold that Rule 52(a) was properly applied. Rule 52(a) requires us to refrain from reweighing evidence, but it does not prohibit us from correcting a district court's legal errors. See Swint VII, 456 U.S. At 291-92, 102 S.Ct. at 1791-92. Swint VI's reversal of the district court on the supervisors issue more readily falls into this latter category. The court held that the district court had erred because (10 Pullman had not put forth "any evidence sufficient to show that the limitation upon which the defendant's business necessity defense rests is essential to the safety and efficiency of [its] operations," and (2) Pullman's rebuttal evidence--the slightly higher rate at which blacks refused promotions to

supervisor and the pressure from other black employees that black supervisors suffered--could not be relied upon because the circumstances cited themselves resulted from the history of discriminatory practices at the Bessemer plant.[50] Swint VI, 624 F.2d at 536.

Both of these grounds reflect legal principles well established in this circuit. See, e.g., Giles v. Ireland, 742

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[50] In some circumstances, this might be considered a fact-finding in itself, but the district court essentially acknowledged that the black rejection rate was connected to the racial atmosphere at the plant. When the court decided to focus in Swint III on the rejection rate of 1971-1973, the court wrote: "Prior to 1971 the turndown rate by blacks was higher, and subsequent to 1972 the rate was probably lower. The 1971-73 figures should be [sic] reasonable approximation for the period as a whole." 15 F.E.P. at 152 n. 21. It is hard to imagine why the district court would be willing to speculate that blacks became more and more likely to accept foreman positions unless it had concluded that the rejection rate and the discriminatory practices at Pullman were related.

F.2d 1366, 1381 (11th Cir. 1984) (judgment for defendant vacated where there was no showing that challenged policy was related to job performance); Watkins v. Scott Paper Co., 530 F.2d 1159, 1192-93 (5th Cir.) (experience requirement could not justify disparate impact where "[p]ast discriminatory practices have either prevented or discouraged many of [defendant's] employees from transferring to many lines of progression and from gaining the experience [the defendant] deems necessary in a supervisor"), cert. denied, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); Stevenson v. International Paper Co., 516 F.2d 103, 117 (5th Cir. 1975) (lack of experience in a particular r line of progression does not justify disparity in appointments to supervisor where blacks were excluded from those lines of progression). Once the

court addressed these legal errors, it was left only with the plaintiffs' showing that a remarkable disparity existed in the selection of supervisors.[51] Because this in turn left only one resolution of the issue, the court reversed. See Swint VII, 456 U.S. at 292, 102 S.Ct. at 1792 ("where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue"). We are thus unable to conclude that Swint VI was manifestly erroneous,

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[51] The court noted that in a workforce ranging from 45% to 50% black, and out of 143 salaried foremen positions, there was not a single black salaried foreman until 1966. In 1970, out of 160 salaried positions, blacks held nine. Through the time of trial in 1974, there had never been a black foreman, temporary or salaried, in thirteen of Pullman's twenty-eight departments. From 1966 through the time of trial, only twelve blacks were selected to fill fifty-nine salaried foreman vacancies. Swint VI, 624 F.2d at 527-28.

and the district court properly regarded its holding on the supervisor issue as the law of the case.

That Swint VII reversed the court's holding on the seniority system does not change this conclusion. It is true that the court in Swint VI referred to the fact that "black employees were locked in the lower paying jobs and departments." 624 F.2d at 536. The context in which this reference was made, however, was in explaining why blacks had become sufficiently demoralized that they might refuse to serve as supervisors. The lock-in effect was not cited as affirmative evidence that Pullman's entirely subjective selection procedure had a disparate impact on black employees. Moreover, Swint VII did not reject the idea that blacks were locked into the lower paying jobs. It merely held, as we do today,

that the seniority system itself was not intentionally discriminatory. Under these circumstances, we do not believe the reference to the lock-in effect--which, due to the discriminatory post-Act departmental assignments, was no doubt a reality at Pullman--renders the Swint VI holding on the selection of supervisors manifestly erroneous.

We affirm the district court's decision that Pullman's subjective procedures for selecting supervisors violated Title VII.

VII. The Larkin Appeal

The Larkin plaintiffs appeal from the district court's denial of their motion under Fed.R.Civ.P. 60(b)(6) to transform its dismissal with prejudice to a dismissal without prejudice. The plaintiffs argue that the Larkin court should have essentially reopened their

case once it became apparent that the Swint court would not hold Pullman liable for any discrimination prior to July 17, 1969 and would not hear any evidence concerning discriminatory intradepartmental assignments. These rulings by the Swint court, the plaintiffs contend, render erroneous the Larkin court's 1976 decision that the Larkin plaintiffs were barred by res judicata.

We affirm the Larkin court's denial of the Rule 60(b)(6) motion. With respect to the liability period, our decision that Pullman should be held liable from October 19, 1965 for its discriminatory assignments of new hire, see supra part III.B, eliminates the Larkin plaintiffs' concern that two years of discrimination against them will not be addressed. With respect to the issue of intradepartmental assignments, our ruling that the district court

did not abuse its discretion in excluding that evidence, see supra part V, must be applied to the Larkin plaintiffs just as it is those in Swint. The Larkin court dismissed the Larkin plaintiffs' case in 1976. From then until 1984, when they moved the court to reconsider their case, the Larkin plaintiffs were operating on the assumption that they were members of the Swint class. Yet at no time during that seven-year period did the Swint plaintiffs ever attempt to put on evidence, which presumably could have come straight from the Larkin plaintiffs, that Pullman was continuing its pre-1965, "white job"-"black job" practice of discriminatory intradepartmental assignments. No meaningful explanation has ever been offered to explain this omission. Under these circumstances, the Larkin plaintiffs cannot be heard to complain

that their claim concerning intradepartmental promotions was unjustly eliminated. In short, it was not the court in Larkin that was under a mistaken impression; it was the plaintiffs, to the extent that they believed that the Swint plaintiffs would properly raise their claim.

VIII. Conclusion

The district court's judgment in Larkin v. Pullman-Standard, No. 84-7319, is affirmed. The court properly denied the Larkin plaintiffs' motion to amend or alter the judgment.

The district court's judgment in the appeal by Pullman Standard, Swint v. Pullman-Standard, No. 87-7057, is affirmed. The plaintiffs proved that the subjective procedures for selecting supervisory personnel had a discriminatory impact on Pullman's black employees, and the district court did not abuse its

discretion in ruling that Louis Swint and Willie Johnson had Rule 23 standing to represent the class on the departmental assignments claim.

The district court's judgment in the appeal on behalf of the Swint plaintiffs, Swint v. Pullman-Standard, No. 86-7886, is affirmed in part and reversed in part. The district court did not err in finding that the seniority system was not created or maintained with discriminatory intent or in finding that any discrimination in departmental assignments ended by February 1969. The district court did err, however, in determining that Pullman could not be liable for any discrimination occurring before July 17, 1969. Pullman should be held liable for any discrimination in departmental assignments, the plaintiffs' section 1981 claim, from October 19, 1965 until January 31, 1969,

and for the discriminatory impact of the supervisory selection procedures, the plaintiffs' Title VII claim, from September 28, 1966 until August 16, 1974.

Accordingly, we remand No. 86-7886 to the district court for further proceedings consistent with this opinion. Phase II proceedings should be held to determine the relief due the plaintiffs on their departmental assignment and selection of supervisors claims.

AFFIRMED in part, REVERSED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7319

WILLIAM B. LARKIN; LOUISE SEALS, as personal representative of SPURGEON SEALS, deceased; LITTLE LOFTON, as personal representative of EDWARD LOFTON, deceased; JESSE B. TERRY, on behalf of himself and others similarly situated,

Plaintiff-Appellants,

versus

PULLMAN-STANDARD DIVISION, PULLMAN, INC., a corporation,

Defendant-Appellee.

No. 86-7886

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated; CLYDE HUMPHREY,

Plaintiffs-Appellants,

versus

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants-Appellees.

No. 87-7057

LOUIS SWINT, and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated; CLYDE HUMPHREY,

Plaintiffs-Appellees,

versus

PULLMAN-STANDARD, Bessemer, Alabama,

Defendant-Appellant,

UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Defendants.

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion SEPTEMBER 21, 1988, 11 Cir., 198_, ___ F.2d____.
JANUARY 3, 1989

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no members of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges inactive service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT;

(Sgd.) Thomas A. Clarke

United States Circuit Judge

ORD-42

*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

—v.—

PULLMAN-STANDARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PULLMAN-STANDARD IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals err in holding not "clearly erroneous" the findings of the District Court that respondent's seniority system with one of its unions was neither adopted nor maintained with discriminatory intent, and hence was bona fide under Section 703(h) of Title VII of the Civil Rights Act of 1964?

LIST OF PARTIES

Pullman-Standard ("Pullman" or "the Company") respectfully offers to correct the list of parties, as it appears on page iii of the Petition. William B. Larkin, Spurgeon Seals, Jesse B. Terry and Edward Lofton are not properly parties to this appeal. They were plaintiffs-appellants in appeal No. 84-7319 below—an independent action consolidated on appeal with Nos. 87-7057 and 86-7886—seeking review of the District Court's denial of their motion to transform the 1976 dismissal of their action with prejudice into a dismissal without prejudice. The denial was affirmed by the Eleventh Circuit below; it is not mentioned in this Petition, and no issue presented in that case has been asserted in this Petition.

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No. 88-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

—v.—

PULLMAN-STANDARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PULLMAN-STANDARD IN OPPOSITION

OPINIONS BELOW

For the complete text of all opinions below in this action, the Court is respectfully referred to the Appendix to the Petition for a Writ of Certiorari filed by Pullman-Standard on March 31, 1989, in No. 88-1601. In the course of this Brief in Opposition, citations to sections of the opinions contained in the Appendix to the instant Petition will appear as "Pet. App. ____." Citations to sections of other opinions below contained in the Appendix to Pullman's petition will appear as "Pullman

App. ____." Citations to the trial transcript will appear as "Tr.," and to the instant Petition as "Pet."

JURISDICTION

The decision of the Court of Appeals was entered on September 21, 1988, and a timely petition for rehearing was denied on January 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982), as amended.

STATUTES INVOLVED

The pertinent text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982), and Rule 52(a) of the Federal Rules of Civil Procedure is set out at Pullman App. 293a-298a.

STATEMENT OF THE CASE

Petitioners seek review of the validity of a seniority system which the District Court below has found to be non-discriminatory on four separate occasions over the past fifteen years, and which the Court of Appeals has affirmed as bona fide within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-2(h) (1982). Indeed, the validity of Pullman's seniority system under Section 703(h) was previously before this Court in *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982) (Pullman App. 231a-258a), which held that the Court of Appeals, in substituting its own findings, had transgressed the proper limits of appellate review under Rule 52 of the Federal Rules of Civil Procedure. On remand from that decision, the District Court reaffirmed its earlier determination that the seniority system had not been adopted or maintained with racially discriminatory intent, and the Eleventh Circuit agreed that these findings were not clearly erroneous. While laboring in this Petition to assert several specious conflicts among the Circuits with respect to the principles governing Section 703(h), petitioners actually seek to have this Court review the findings of both courts below that Pullman

instituted and maintained a seniority system without a discriminatory motive—"a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Swint VII*, 456 U.S. at 287-88 (Pullman App. 243a). In any event, petitioners' challenge to Pullman's seniority system is time-barred under this Court's recent ruling in *Lorance* v. *AT & T Technologies, Inc.*, ____ U.S. ____, 109 S. Ct. 2261 (1989).

On October 19, 1971, Louis Swint and Willie James Johnson initiated this class action under Title VII and 42 U.S.C. § 1981 (1982), naming Pullman and the United Steelworkers of America, AFL-CIO (as well as Local 1466 of the United Steelworkers) (collectively "USW") as defendants. As pertinent to this Petition, they challenged the departmental seniority system at Pullman's Bessemer, Alabama plant—maintained in accordance with the collective bargaining agreements between Pullman and the USW—charging that the system perpetuated the effects of pre-Title VII discrimination. The USW represented production and maintenance employees in twenty-six of the plant's twenty-eight departments; a second union, the International Association of Machinists, AFL-CIO ("IAM"), which represented employees in the remaining two departments, was later joined only for limited remedial purposes.[1]

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1 Although the IAM had not been named in the original complaint, the amended complaints, or any of the charges filed with the Equal Employment Opportunity Commission ("EEOC"), the District Court permitted joinder of the IAM and its Local Lodge 372 on the eve of trial—not for the purpose of liability, but solely in the event the relief sought by plaintiffs' challenge to the Pullman-USW seniority system might require some modification of the IAM labor agreement. *See Swint* v. *Pullman-Standard* (*Swint V*), 17 FEP Cas. (BNA) 730, 732 n.2 (N.D. Ala. 1978) (Pullman App. 203a n.2).

Petitioners now seek to alter the focus of the entire litigation. Having conceded below that the USW was not acting with discriminatory intent in adopting or maintaining the Pullman-USW seniority system, *see Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1578 n.46 (11th Cir. 1988), *pet. for cert. filed sub nom. Pullman-Standard* v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (Pet. App. 179a n.45), they offer this Court the wholly novel conten-

Under the Pullman-USW labor agreements, seniority was measured by length of continuous service in a particular department and considered for purposes of layoff, recall and promotion. All employees, white or black, who sought transfer to a new department lost any seniority they had accrued in the old department. This departmental seniority system in effect since 1954 remained virtually unchanged until 1972, when Pullman entered into an agreement with the United States Department of Labor enabling black employees hired before 1965 to transfer from predominantly black departments or to predominantly white departments without losing seniority.[2]

After a 16-day trial, the District Court concluded in 1974 that "the seniority system at Bessemer is not perpetuating the effects of prior discrimination." *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 952; *see also id.* at 954 (Pullman App. 74a, 78a). Indeed, the trial court pointed out that the "Steelworkers local, which was organized principally by blacks, and whose policies over the years have been shaped as much by blacks as by whites," had advocated departmental seniority and rejected Pullman's proposals to merge several departments for broader seniority units. *Swint I*, 11 FEP Cas. (BNA) at 954 (Pullman App. 78a). On appeal, the Fifth Circuit nevertheless remanded for a new determination of the validity of the senior-

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tion that this case "also presents" a dispute as to the bona-fides of the Pullman-IAM seniority system (Pet. at 25 n.25). The District Court made clear, however, that "[t]he seniority system under attack in this case has its essence in the 1954 company-wide collective bargaining agreement between Pullman and the United Steelworkers," that the IAM seniority units are "not directly at issue in this litigation," and that evidence concerning IAM is relevant only to the extent it sheds light on the validity of the USW-Pullman system. *See Swint V*, 17 FEP Cas. (BNA) at 732 & n.2 (Pullman App. 185a & 203a n.2). Moreover, the IAM agreements provided for seniority by *occupation* rather than department, *see id.* at 733 n.4 (Pullman App. 204a n.4); a challenge to occupation-based seniority was simply not preserved among the "class issues" listed in the District Court's pre-trial order. *See Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 (N.D. Ala. 1974) (Pullman App. 66a-67a).

2 *See Swint V*, 17 FEP Cas. (BNA) at 732 (Pullman App. 185a).

ity system in light of its rulings as to plaintiffs' evidence of discrimination in initial assignments to departments. *Swint* v. *Pullman-Standard* (*Swint II*), 539 F.2d 77, 97-98 (5th Cir. 1976) (Pullman App. 127a-128a).

While the matter was on remand, this Court rendered its decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), holding that a bona fide seniority system under Section 703(h) could not be invalidated on the ground that it perpetuated the effects of pre-Title VII discrimination. *Teamsters* requires proof of discriminatory intent in the adoption or maintenance of the system in order to find a Title VII violation. Also in the interim, the Fifth Circuit, in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), developed a four-factor test consistent with *Teamsters* for assessing the validity of a seniority system.[3] On remand in 1978, the District Court held further evidentiary hearings and, in an opinion extensively discussing *Teamsters* and the *Stockham Valves* factors, sustained the validity of the Pullman-USW system for the third time. *Swint* v. *Pullman-Standard* (*Swint V*), 17 FEP Cas. (BNA) 730, 732-739 (N.D. Ala. 1978) (Pullman App. 182a-201a).[4]

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3 *Stockham Valves* requires an inquiry into "1) whether the seniority system operates to discourage all employees equally from transferring between seniority units; 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice); 3) whether the seniority system had its genesis in racial discrimination; and 4) whether the system was negotiated and has been maintained free from any illegal purpose." *See* 559 F.2d at 352.

4 In its second pronouncement on the issue, the District Court, after taking additional evidence, again found the seniority system bona fide. The court did not issue its opinion, however, until after *Teamsters* had been decided. *Swint* v. *Pullman-Standard* (*Swint III*), 15 FEP Cas. (BNA) 144 (N.D. Ala. 1977) (Pullman App. 156a-164a). Subsequently, in view of the fact that plaintiffs had predicated their challenge on a theory rejected by *Teamsters*—the perpetuation of pre-Title VII discrimination—the court reopened the case for what was a third evidentiary hearing and ruling. *Swint* v. *Pullman-Standard* (*Swint IV*), 15 FEP Cas. (BNA) 1638 (N.D. Ala. 1977) (Pullman App. 178a).

First, as to the neutrality of the system, the trial court found that "[t]o the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black," at least until the 1972 Labor Department agreement *favoring* certain black employees. *Id.* at 733 (Pullman App. 187a). Second, the seniority unit structure was found to be consistent with industry practice and a rational response to both the extreme fluctuation in employment levels and the absence of lines of progression within departments. Addressing the existence of two (one USW and one IAM) Die & Tool and Maintenance departments, the court determined that this separation was not orchestrated with discriminatory purpose by Pullman, but was imposed by specific unit determination decisions of the National Labor Relations Board (NLRB). *Id.* at 736 (Pullman App. 193a-194a). Third, although the seniority system had its genesis at a time when racial discrimination was practiced, "this system was not itself the product of this bias," but "came about as a result of colorblind objectives" of a union that "was not an arm of a segregated society." *Id.* at 738 (Pullman App. 198a). Declining to make any findings as to the motives of the IAM, the court ruled that any possible discriminatory motive on the part of that union could not be attributed to Pullman or to the USW. *Id.* at 739 (Pullman App. 199a-200a). Finally, the court found that the Pullman-USW system had been "negotiated and maintained free from any discriminatory purpose." *Id.* at 739 (Pullman App. 200a). Based on the totality of the circumstances, the trial court concluded that the seniority system was bona fide under Section 703(h).

On appeal, the Fifth Circuit reviewed the evidence *de novo*. Stressing the existence of separate Die & Tool and Maintenance departments, the appeals court concluded that the purpose of the IAM was to exclude black workers from its own units, and therefore the motivation of that union infected the validity of the Pullman-USW system. *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525, 532-34 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (Pullman App. 218a-222a).

This Court granted certiorari and reversed the Fifth Circuit's failure to honor the limits of appellate review mandated by Rule

52 of the Federal Rules of Civil Procedure. *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273, 276 (1982) (Pullman App. 231a-258a). The Court of Appeals had failed to appreciate that under Section 703(h), "there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system . . .[, which finding is] a pure question of fact." *Id.* at 289 (Pullman App. 244a-245a). Stating unequivocally that "IAM's discriminatory motivation, if it existed, cannot be imputed to USW," this Court explained that evidence of a discriminatory purpose on the part of the IAM is relevant only to the extent it may shed some light on the purpose of the USW or Pullman "in creating and maintaining the separate seniority system at issue in these cases." *Id.* at 292 n.23 (Pullman App. 248a).

On remand,[5] after yet another trial, the District Court concluded that nothing in plaintiffs' most recent presentation altered the conclusion it had reached in *Swint V* that "[t]he defendants have successfully carried their burden of showing that the seniority system is *bona fide* . . . ." *Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 11 (N.D. Ala. Sept. 8, 1986) (Pet. App. 30a-31a).[6]

The Eleventh Circuit (which inherited this litigation) affirmed on the Section 703(h) issue. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549 (11th Cir. 1988), *pet. for cert. filed sub nom. Pullman-Standard* v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (Pet. App. 58a-211a). Relying on *Teamsters*, the Court of Appeals found no showing that "the [seniority] system *itself* was negotiated or maintained with an actual intent to discriminate," and concluded that "none" of plaintiffs' "evidence goes directly to Pullman's intent regarding the *system*." 854 F.2d at 1576-77 (Pet. App. 171a-175a) (emphasis in original). The Court of Appeals further held that the District Court was warranted in

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5 *Swint* v. *Pullman-Standard* (*Swint VIII*), 692 F.2d 1031 (5th Cir. 1983) (per curiam) (Pet. App. 1a-4a).

6 The District Court thereafter granted plaintiffs' motion for entry of judgment in *Swint* v. *Pullman-Standard* (*Swint X*), No. CV 71-P-0955-S, slip op. at 5 (N.D. Ala. Nov. 26, 1986) (Pet. App. 41a-57a).

discounting "the plaintiffs' circumstantial evidence in the face of considerable direct evidence that the system was not the product of discriminatory intent," and that "there was nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority." *Id.* at 1577-78 (Pet. App. 175a-178a).[7]

REASONS FOR DENYING THE WRIT

Although this Petition purports to raise a number of supposed legal issues and to articulate a number of conflicts among the Circuits, it in fact seeks this Court's review of purely factual findings of both courts below that the Pullman-USW seniority system was not adopted or maintained with a racially discriminatory motive. The putative conflicts either do not exist or have already been fully resolved by this Court. Furthermore, peti-

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7 The Court of Appeals observed that the District Court "carefully analyzed the evidence presented, paying special attention to the four factors" emphasized in the *Stockham Valves* decision. As to whether the seniority system equally discouraged transfers by blacks and whites, the appeals court noted that "[t]he evidence revealed that whites as well as blacks often desired to transfer but were disinclined to do so because they would lose their seniority." On the rationality of the units, the evidence "also showed that systems including nontransferable seniority between given units are quite common not only with manufacturers generally but with manufacturers of railroad cars." Although the seniority system was established at a time when Pullman was "discriminatory in other respects," there was "nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority." Rather, it was Pullman that sought without success to merge seniority units:

> "Indeed, there was evidence that Pullman would have preferred no seniority or the narrowest seniority possible so that it could have the greatest flexibility in filling vacant positions. There was also evidence that at a meeting of primarily black USW employees, a proposal to merge certain departments was voted down."

In sum, the Court of Appeals concluded that "[h]aving thus found that three of the four *James* factors went against a finding of discriminatory intent, the [district] court was not clearly erroneous in concluding that the seniority system was bona fide." 854 F.2d at 1577-78 (Pet. App. 175a-178a).

tioners' challenge to Pullman's seniority system, adopted in 1954, is time-barred under this Court's ruling in *Lorance* v. *AT & T Technologies, Inc.*, ____ U.S. ____, 109 S.Ct. 2261 (1989). The Petition should be denied.

A. Petitioners' Alleged "Four Seniority Related Practices" Mischaracterize The Record And, At Bottom, Constitute Merely A Disagreement With The Factual Findings Of Both Courts Below

In an effort to create the mirage of a legal issue warranting this Court's attention, petitioners argue that the courts below erroneously concluded that the Pullman-USW system was bona fide in the face of four allegedly racially motivated "seniority related practices": (1) post-Act intradepartmental promotions; (2) the creation of separate IAM and USW Maintenance and Die and Tool departments in 1941; (3) the alleged creation of eight new departments in 1954; and (4) Pullman's requirement after 1965 that individuals seeking positions as welders demonstrate either past experience as a welder or completion of a welder training program (with tuition reimbursement by Pullman).[8] This list of so-called "seniority related practices" mischaracterizes the record and, at bottom, merely constitutes petitioners' disagreement with the manner in which the courts below weighed the evidence.

1. Post-Act Intradepartmental Promotions

Petitioners claim the existence of post-Act discrimination in intradepartmental assignments and describe this alleged practice as "an unresolved dispute" (Pet. at 12). As the Court of Appeals noted, however, because plaintiffs could offer no justification for belatedly attempting to produce evidence on this theory for the first time at the fourth trial in 1984, the District

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8 Black employees were principal beneficiaries of this reimbursement program. *Swint I*, 11 FEP Cas. (BNA) at 947 & n.16 (Pullman App. 65a & 94a n.16).

Court did not abuse its discretion in excluding it. *Swint XI*, 854 F.2d at 1578 (Pet. App. 180a-182a).[9]

2. The Creation of Separate IAM and USW Departments in 1941

Petitioners complain of the creation in 1941 of separate IAM and USW Maintenance and Die and Tool Departments, along with the IAM's agreement in 1944 to cede certain of its own job classifications to the USW (Pet. at 15-20). Both courts below found that these events did not undermine the validity of the Pullman-USW seniority system. The District Court determined that the existence of these divided departments was "due to actions of the NLRB in 1941," that there was no evidence of "any industry practice to combine positions represented by different unions into the same seniority unit," and that any dispute over the IAM's motivation in ceding the job classifications was irrelevant because neither Pullman nor the USW had been motivated by racial discrimination. *Swint V*, 17 FEP Cas. (BNA) at 736, 738-39 (Pullman App. 193a, 199a-200a). The Court of Appeals upheld the findings as to the rationality of the seniority units and the absence of a discriminatory motive on Pullman's part. *Swint XI*, 854 F.2d 1577-78 (Pet. App. 179a-180a).

3. The Alleged Creation of Eight New Departments In 1954

Petitioners also challenge the failure to resolve whether Pullman acted with racial motivation in allegedly creating eight new departments in 1954 (Pet. at 24). There has never been a finding below, however, that eight new departments were created that year. In any event, the District Court, after assessing the evidence presented as to all of Pullman's departments, expressly

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9 As to the issue of posting job vacancies, which petitioners attempt to link to this foreclosed issue of intradepartmental assignments (Pet. at 13-14), the Court of Appeals in *Swint II* agreed with the District Court that any failure to post vacancies did not state an independent Title VII violation. *See Swint II*, 539 F.2d at 102 (Pullman App. 134a).

determined that the Company's departmental structure was "rational, in accord with the industry practice, and consistent with NLRB policies," and "that the seniority system between the company and the USW has been negotiated and maintained free from any discriminatory purpose." *Swint V*, 17 FEP Cas. (BNA) at 737, 739 (Pullman App. 195a, 200a). Moreover, it was the USW—who petitioners now concede was not motivated by racial animus (*see* note 1, *supra*)—that resisted Pullman's efforts to merge departments for broader seniority units. *Id.* at 736-37 n.18, 738 (Pullman App. 205a n.18, 198a). The Court of Appeals admitted that its previous conclusion to the contrary did not survive this Court's *Swint* decision, and sustained the District Court's findings both as to the rationality of the seniority units and the absence of evidence of discriminatory intent on Pullman's part in negotiating or maintaining the nontransferable seniority system. *Swint XI*, 854 F.2d at 1577-78 & n.45 (Pet. App. 177a-179a & n.44).

4. The 1965 Training Requirement

Petitioners' final dispute with the record concerns Pullman's decision in 1965 to assign to welding positions only those who had prior experience as welders or who had completed a welder training program (with tuition reimbursement by Pullman) (Pet. at 24-28). Initially, as both courts below noted in earlier decisions, it is doubtful whether this issue—not listed among the "class issues" in the pre-trial order—is properly in the case. *See Swint I*, 11 FEP Cas. (BNA) at 947 n.16 (Pullman App. 94a n.16); *Swint II*, 539 F.2d at 89 (Pullman App. 114a). In any event, the District Court's factual findings—that Pullman "actively sought and trained blacks" to be welders, imposed a training requirement for the nondiscriminatory reason of "prevent[ing] on-the-job training of unqualified whites," and did so only after "black employees were given an opportunity to demonstrate their skills as welders"—remain undisturbed. *Swint III*, 15 FEP Cas. (BNA) at 152 & n.21 (Pullman App. 170a & 176a n.21).[10]

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10 Petitioners' selective quotation from the testimony of Harry Debrow, a black equal employment officer at Pullman, (Pet. at 27

B. The Purported Conflicts Among The Circuits Do Not Withstand Analysis

None of petitioners' purported conflicts among the Circuits withstands analysis.

1. Petitioners Improperly Characterize The Focus Of The Court Below As Restricted To The Neutrality Of The Literal Terms Of The Seniority Rules

Petitioners first assert that the Eleventh Circuit is in conflict with several other Circuits in confining its assessment of the validity of a seniority system to the neutrality of the rules as written. This assertion mistakes the nature of the inquiry undertaken by the District Court and affirmed by the Court of Appeals. By their careful consideration of all of the factors suggested in *Teamsters* and *Stockham Valves*, both courts below plainly did not restrict their focus to the literal terms of the Pullman-USW system. The Court of Appeals concluded, moreover, that on the record it could not say that "the district court attributed insufficient significance to plaintiffs' circumstantial evidence in the face of considerable direct evidence that the system was not the product of discriminatory intent." *Swint XI*, 854 F.2d at 1577 (Pet. App. 175a-176a).

Ultimately, petitioners are questioning the holding of this Court in *Teamsters*. Central to that decision is the distinction between discriminatory practices—independent of a seniority system—that may impact upon seniority rights and intentional

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n.12), indicates only that whites may have been unwilling to train more senior employees, whether black or white, who could then displace them. This emerges clearly from Debrow's testimony on direct:

> "A • • • So this young man, he agreed to go to school. Nobody there in his department would teach him how to do the job. The operators who were there said they weren't going to train him *because he had seniority over them.*
>
> "Q Was the man you are talking about a Black man?
>
> "A Black and White. It was a White man operating at the present, and they wouldn't train him." (1984 Tr. 121-22) (emphasis supplied)

discrimination in the adoption or maintenance of the seniority system itself. There was no question in the *Teamsters* case that the union and employer had engaged in purposeful discrimination by deliberately barring black employees from higher-paying line driver jobs. The non-transferable departmental seniority system, in turn, perpetuated the effects of that discrimination by discouraging blacks from transferring thereafter to the higher-paying jobs and forfeiting their seniority. Nevertheless, this Court held that the seniority *system itself* was shielded under Section 703(h) in the absence of a finding of discriminatory intent in the adoption or maintenance of the system.

Findings of intentional discriminatory practices that affect senority rights—such as the exclusion of black employees from higher-paying jobs—certainly warrant specific remedies for the victims of those practices, including awards of competitive seniority under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). But to hold, as petitioners suggest, that such practices—insofar as they impact upon entitlements under a seniority system—therefore render the entire seniority system invalid, would undermine the thrust of *Teamsters* and would require relief for a vastly larger group that would not otherwise qualify for relief under *Franks*. This Court has therefore concluded repeatedly that " 'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.' " *Lorance* v. *AT & T*, *supra*, 109 S. Ct. at 2265, quoting *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). Rather, there must be a showing—not made in this case—of discriminatory purpose infecting the system itself. *See id.* at 83 n.13; *see also United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-60 (1977).

Moreover, none of the cases cited by petitioners in their endeavor to chart a conflict embraces their expansive theory or is inconsistent with the ruling below by the Eleventh Circuit. To the extent these cases are remotely on point, they involve appellate affirmance of trial court findings that the seniority system itself was adopted or maintained with discriminatory intent. *See*

Wattleton v. *International Brotherhood of Boiler Makers, Local 1509*, 686 F.2d 586, 590-91 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) (affirming trial court's factual finding that the seniority system itself was negotiated and maintained for illegal discriminatory purpose) *Taylor* v. *Mueller Co.*, 660 F.2d 1116, 1123 (6th Cir. 1981) (requiring proof of an "illegal purpose [that] entered into the negotiation of the seniority system"); *Mitchell* v. *Mid-Continent Spring Co.*, 583 F.2d 275, 280 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979) (overt sex-based seniority lists; no discussion of Section 703(h)).

2. IAM's Motive May Not Properly Be Imputed To Pullman

Petitioners also urge this Court to resolve a putative conflict between the Eleventh Circuit and the Tenth and Fourth Circuits over whether an employer can escape liability under Title VII by claiming that it was merely accommodating the discriminatory preferences of a union. This, too, misstates what the Court of Appeals held below.

The Eleventh Circuit simply followed this Court's instructions in *Swint VII*:

> "IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of the USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of the IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of the USW." *Swint VII*, 456 U.S. at 292 n.23 (Pullman App. 248a).[11]

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11 Recognizing the force of this Court's *Swint VII* instructions, petitioners abandoned in the latest appeal their contention that the USW acted with a discriminatory purpose (*see* note 1, *supra*). They nevertheless struggle to keep Pullman in the case by contending, for the first time in this Petition, that this case somehow "also involves" the validity of the Pullman-IAM system (*see id.*).

The Court of Appeals did not ignore evidence of the IAM's possibly racial motives. Rather, the court held—in agreement with the District Court—that there was "nothing" in the record "to suggest that *Pullman* acted with discriminatory intent in negotiating or maintaining nontransferable seniority." *Swint XI*, 854 F.2d at 1577-78 (Pet. App. 175a-178a) (emphasis added).

The cases cited by petitioners in support of a purported conflict among the Circuits on this issue are either off the mark, *see Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (pre-*Teamsters* decision applying disparate impact analysis), or simply involve an application of the *Teamsters-Stockham Valves* factors to a different set of facts, *see Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982).[12]

3. The Court Below Properly Placed The Burden Of Persuasion On Plaintiffs

Finally, petitioners maintain that the Eleventh Circuit is in conflict with other Circuits in placing on plaintiffs the burden of persuading the trier of fact that a seniority system is the product of discriminatory intent. This burden-allocation is consistent, however, with decisions of this Court that Section 703(h) "unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Trans World Airlines, Inc.* v. *Hardison*, *supra*, 432 U.S. at 83 n.13; *see also Swint VII*, 456 U.S. at 289; *Teamsters* v. *United States*, *supra*, 431 U.S. at 353; *United Airlines, Inc.* v. *Evans*, *supra*, 431 U.S. at 553-54. This Court's recent decision in *Lorance* v. *AT & T*, *supra*, 109 S.Ct. 2261, makes clear that Section 703(h) does not create an affirmative defense to be proved by

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12 In *Sears*, decided before this Court's *Swint VII* decision, the appeals court's brief discussion of employer liability was not predicated on an imputation of the union's discriminatory motives to the employer. Rather, employer liability was found because the application of the *Teamsters-Stockham Valves* factors led to the conclusion that the seniority system was not bona fide under Section 703(h). Moreover, the employer in that case had settled, rendering the court's discussion of the employer's liability dictum. *See* 645 F.2d at 1368.

defendant, but rather stipulates that discriminatory intent is an element of the statutory offense to be established by plaintiff. A contrary interpretation of Section 703(h) is:

> "foreclosed by our cases, which treat the proof of discriminatory intent as a necessary element of Title VII actions challenging seniority systems. At least as concerns seniority plans, we have regarded subsection (h) not as a defense to the illegality . . . but as a provision that itself 'delineates which employment practices are illegal and thereby prohibited and which are not.' *Franks*, 424 U.S., at 758, 96 S. Ct., at 1261. Thus, in *American Tobacco Co.* [v. *Patterson*, 456 U.S. 63 (1982)] we determined § 703(h) to mean that 'the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved.' 456 U.S., at 65, 102 S. Ct., at 1535." *Lorance* v. *AT & T*, *supra*, 109 S.Ct. at 2267.[13]

Moreover, petitioners fail to identify any conflict among the Circuits on the issue. Two cases—cited in other parts of the Petition—place the burden of persuasion properly on the plaintiff. *See Wattleton* v. *Boiler Makers*, *supra*, 686 F.2d at 590; *Sears* v. *Bennett*, *supra*, 645 F.2d at 1370. Although the Sixth Circuit initially referred to the issue in an ambiguous manner, *see EEOC* v. *Ball Corp.*, 661 F.2d 531, 538-39 (6th Cir. 1981), it has subsequently stated unequivocally—as did the Eleventh Circuit here—that the burden is on the plaintiff. *See Black Law*

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13 Petitioners' reliance on decisions arising under other statutes—the Equal Pay Act, 29 U.S.C. § 206(d) (1982) and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)—is misplaced. The Equal Pay Act does not require proof of discriminatory intent; a statutory violation is made out by demonstrating unequal pay between men and women in equal jobs. *See, e.g., Peters* v. *City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988). The seniority plan defense under Section 4(f)(2) of ADEA, 29 U.S.C. § 623(f)(2), does not come into play until what would otherwise be a statutory violation already has been proven. *See, e.g., Henn* v. *National Geographic Society*, 819 F.2d 824, 827-28 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

Enforcement Officers Ass'n v. *City of Akron*, 824 F.2d 475, 481 (6th Cir. 1987).[14]

C. Petitioners' Challenge To The Validity of a Facially Neutral Seniority System Adopted In 1954 Is Time-Barred

The departmental seniority system challenged in this case was established as a result of the 1954 collective bargaining agreement between Pullman and USW. *See Swint V*, 17 FEP Cas. (BNA) at 732 & n.2 (Pullman App. 184a & 203a). Under the Court's *Lorance* v. *AT & T* decision, a Title VII challenge to a facially neutral seniority system, as here, requires the filing of a charge with the EEOC within 180 days of adoption of the system, or it is time-barred. As this Court observed: "allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect." *Lorance* v. *AT & T*, *supra*, 109 S. Ct. at 2269.

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14 Petitioners point also to the Fifth Circuit in *Bernard* v. *Gulf Oil Corp.*, 841 F.2d 547, 551, 554 (5th Cir. 1988). The *Bernard* court, however, did not hold that a defendant has the burden of proving that its seniority system is valid; at the pages cited, the court simply restated plaintiffs' characterization of the issues as including defendant's failure of proof with respect to Section 703(h). Moreover, as cited by the Court of Appeals below, the Fifth Circuit previously has indicated its view that the burden rests with plaintiff. *See Harris* v. *Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir. 1980) (per curiam).

CONCLUSION

Petitioners are seeking review of findings of fact adopted by both courts below and present no significant legal issue or conflict among the Circuits warranting this Court's resolution. The Petition therefore should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

v.

PULLMAN-STANDARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Eleventh Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

This appeal and petition do not, as respondent suggests, concern disputed issues of fact. The courts below candidly acknowledged that the Pullman-Standard's seniority system was administered in an expressly and avowedly racial manner. For

decades before 1965, and for a number of years thereafter, promotions were made to the "senior white" or "senior black," according to the racial categorization of each vacancy. Both courts below also agreed that a number of previously integrated departments had been separated into all-white and all-black departments for avowedly racial reasons. Respondent's Brief in Opposition, although raising a variety of peripheral factual issues, does not dispute these critical findings. Respondent does deny that its termination of on-the-job training for senior bidders was racially motivated (Br. Opp. 11-12), but the district and circuit courts held otherwise. (Pet. 27-28).

What is at issue here, as in the circuit court, is the legal significance of these avowedly discriminatory seniority practices. Respondent prevailed below on

a contention of law -- that the types of intentional racial discrimination which permeated the Pullman-Standard seniority system were, as a matter of law, legally irrelevant. That contention turns not on any disputes of historical fact, but on the interpretation of section 703(h) of Title VII and the meaning of Teamsters v. United States, 431 U.S. 324 (1977). The circuit court understood that the appeal before it raised essentially legal issues. (See Pet. App. 167a); it upheld the seniority system only because it had resolved those legal issues in respondents' favor. Respondent's contention that there was insufficient evidence to prove the seniority system non-bona fide is in reality a contention that the courts below properly held legally irrelevant most of the evidence of racially motivated seniority practices.

Respondent argues repeatedly that the merit of this petition is controlled by the Court's June, 1989 decision in Lorance v. A.T. & T. Technologies, Inc., 104 L.Ed.2d 961 (1989). (Br. Opp. 3, 9, 13, 15-16, 17). We agree that this case raises a number of important issues regarding the meaning of Lorance, but urge that the ramifications of Lorance are far from clear, and that certiorari should be granted to address the questions posed by that decision.

Respondent's most important legal contention is that under Lorance a seniority system adopted prior to 1965 for avowedly racially discriminatory purposes would, nonetheless, be bona fide as a matter of law. (R.Br. 17-18). Respondent argues that, even though the Pullman-Standard seniority practices may have been structured and operated for the express

purpose of discriminating against blacks, such an invidious intent is irrelevant because the system and practices were established prior to 1965, and are thus "time-barred." (R. Br. 17). Although the circuit court opinion in this case pre-dates Lorance, respondent's argument is a plausible construction of the decision below. Whether Lorance in fact declares bona fide all pre-Act racially motivated seniority systems is a legal issue of great importance which this Court should grant certiorari to resolve.

Prior to Lorance the decisions of this Court left no doubt that a racially-motivated pre-Act seniority system was, by definition, not bona fide. Teamsters v. United States, 431 U.S. 324 (1977), held that Congress added section 703(h) to the 1964 Civil Rights Act in order to protect then existing seniority systems, provided

that they were bona fide. 431 U.S. at 343-56. Teamsters upheld the longstanding seniority system in that case because, in part, it did not "have its genesis in racial discrimination." 431 U.S. at 356. In California Brewers Assn. v. Bryant, 444 U.S. 598 (1980), the Court directed the lower courts to decide whether a seniority system established prior to 1960 was or was not bona fide. 444 U.S. at 602, 611. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court addressed an issue which it thought had been left unresolved by Teamsters, whether section 703(h) protects post-Act bona fide seniority systems. The majority concluded that "§ 703(h) makes no distinction between pre-Act and post-Act seniority systems," 456 U.S. at 71, which could be invalidated only if there was "actual intent to discriminate." 456 U.S. at 65.

The Court held that a plaintiff could defeat the defense provided by section 703(h) if he or she could prove that a seniority system, no matter how old, was invidiously motivated.[1] When the instant case was before this Court in 1982, the Court indicated that the bona fides of the seniority system would turn, at least in part, on "the purpose of ... creating ... the seniority system," notwithstanding the fact that the system, as respondent now emphasizes, had been created long before the adoption of Title VII. Pullman-Standard v. Swint 456 U.S. 273, 292 n. 23 (1982).

This entire line of cases, as respondent observes, has been called into

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[1] 456 U.S. at 70 ("employees who seek redress under Title VII more that 180 days after the adoption of a seniority system ... would have to prove the system was intentionally discriminatory") (footnote omitted).

question by Lorance. The defendants in Lorance expressly urged this Court to hold that a seniority system created prior to 1965 for the purpose of racial discrimination is, as a matter of law, bona fide under section 703(h). (Pet. 32-33 n. 18). The majority opinion in Lorance, although stopping short of such a holding, undeniably contains language which lends some support to such a major change in the interpretation of section 703(h).[2]

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[2] E.g. 104 L.Ed.2d 973.

> "At least as concerns seniority plans, we have regarded subsection (h) ... as a provision that itself delineates which employment practices are illegal and thereby prohibited and which are not .... Thus petitioners' claim depends on proof of intentionally discriminatory adoption of the system, which occurred outside the limitations period."

104 L.Ed.2d at 975:

> "[A] facially neutral system, if it

But Lorance held only that employees must act promptly if they wish to challenge post-Act alterations in seniority rules; it did not suggest that pre-Act seniority rules could never be challenged at all. Although respondent characterizes our challenge to the Pullman seniority rules as "untimely," on respondent's view of the law no timely Title VII charge could ever be filed against a pre-Act seniority system, since Title VII itself did not exist at the time when the racially motivated pre-Act practices and rules were adopted.

We do not think that the Court in Lorance in fact intended to overrule

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is adopted with unlawful discriminatory motive, can be challenged within the prescribed period after adoption. But allowing a facially neutral system to be challenged ... many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect."

Teamsters, Patterson, California Brewers, and the Court's prior decision in Swint. In Lorance, unlike Teamsters and the instant case, there was no claim that the disputed seniority practice perpetuated the effects of past discrimination. The claim in Lorance was more closely analogous to the issue in Delaware State College v. Ricks, 449 U.S. 250 (1980), on which the majority relied, than to the circumstances in Teamsters. As the Court observed in Teamsters, section 703(h) was adopted in 1964 primarily to protect then existing seniority systems, provided they were bona fide. Congress clearly intended this proviso to distinguish between then existing systems which were and were not bona fide. But if evidence of pre-Act invidious motives were irrelevant, then all the seniority systems in existence in 1964 would have been bona fide.

Although we think respondent's construction of Lorance is ultimately unsound, the passages in Lorance on which respondent relies undeniably throw into question virtually every pending case challenging the bona fides of a seniority system. In almost all of those cases the alleged invidious purpose concerned the creation of a seniority system years before Title VII was ever adopted. If such a pre-Act invidious motivation is indeed irrelevant to the bona fides of a seniority system, Teamsters, Patterson, California Brewers and this Court's previous decision in Swint would all now be bad law. The circumstances of this case, as respondent itself suggests, squarely present that issue, and certiorari should be granted to resolve it.

This case also involves seniority practices adopted or maintained for discriminatory purposes after the enactment of Title VII. Here too, there is a disagreement about the meaning of Lorance. Both before and for some time after the adoption of Title VII the actual seniority rule at the plant was to promote the "senior white" or "senior black," according to the racial designation of each vacancy. The Eleventh Circuit thought this largely irrelevant to the bona fides of the seniority system because the nominal written seniority rules contained no such racial standard. Lorance makes a sharp distinction between a "facially neutral" seniority system and "a facially discriminatory system." 104 L.Ed.2d at 975 n. 5. But the distinction in Lorance turns, not as in the Eleventh Circuit on nominal written rules, but on

actual seniority practices; Lorance makes clear that a seniority system would be unlawful under Title VII if it were "operated in an intentionally discriminatory manner." 104 L.Ed.2d at 971. (Emphasis added). In this regard the decision of the Eleventh Circuit is squarely inconsistent with the decision in Lorance.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Eleventh Circuit. In the alternative, it might be

appropriate to vacate and remand the decision of the Court of Appeals for reconsideration in light of Lorance.

Respectfully submitted,

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